88-1412

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET J. RANDALL; NORMAN MAILER; ARTHUR MILLER; TONI MORRISON; ANNE NOGGLE; GRACE PALEY; PEN AMERICAN CENTER; ROSE STYRON; WILLIAM STYRON; HELENE VANN; KURT VONNEGUT; ALICE WALKER; DR. MARY MARTHA WEIGLE,

Petitioners,

—against—

RICHARD THORNBURGH, in his capacity as Attorney General of the United States; ALAN C. NELSON, in his capacity as Commissioner of the Immigration and Naturalization Service; A.H. GIUGNI, in his capacity as District Director of the Immigration and Naturalization Service, El Paso, Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 21, 1989

QUESTION PRESENTED

1. Whether petitioner Margaret Randall is precluded from challenging an Immigration and Naturalization Service District Director's discretionary decision to deny her permanent resident status on the ground that disapproves of the political content of her writings.

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No. 88-
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

MARGARET RANDALL, et al.,
Petitioners,

v.

RICHARD THORNBURGH, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Margaret Randall, Norman Mailer, Arthur Miller, Toni Morrison, Anne Noggle, Grace Paley, Rose Styron, William Styron, Helene Vann, Kurt Vonnegut, Alice Walker, and Pen American Center, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled

proceeding on August 16, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit (App. 1a-93a) is reported at 854 F.2d 472. The opinion of the United States District Court for the District of Columbia (Penn, J.) (App. 94a-123a) has not been reported.

JURISDICTION

The court of appeals issued its judgment and opinion on August 16, 1988. On October 24, 1988, the court of appeals denied a petition for rehearing.

On January 12, 1989, Chief Justice William H. Rehnquist ordered that the time for filing this petition for writ of certiorari be extended to and including February 21, 1989.

The Court has jurisdiction to review the judgment of the D.C. Circuit under 28

U.S.C. §1254(1).

STATUTES INVOLVED

8 U.S.C. §1105a(a) provides:

> (a) Exclusiveness of procedure. The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that--
>
> (1) Time for filing petition. A petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later;
>
> (2) Venue. The venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;
>
> (3) Respondent; service of petition; stay of deportation. The action shall

be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) Determination upon administrative record. Except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a while, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo. Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where

a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under provisions of section 2201 of title 28 United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity or order; appeal. If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been

initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to the nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien. Nothing in section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsection (d) and (e) of section 242 of

this Act. Nothing contained in this section shall construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) Typewritten record and briefs. It shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs;

(9) Habeas corpus. Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

8 U.S.C. §1255(a) provides:

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. §1329 provides:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 275 or 276 may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

STATEMENT OF THE CASE

A. Introduction

This lawsuit challenges the decision of an Immigration and Naturalization Service (INS) District Director to deny Margaret Randall, a feminist author and professor, adjustment of status to permanent resident

alien because of the political content of her writings. Petitioners maintain that the District Director's denial, which was based on his discretionary determination that Ms. Randall's "writings go far beyond mere dissent," was statutorily unauthorized and violated Ms. Randall's First Amendment rights.

The court of appeals did not address the merits of petitioners' claims, however, because it determined, in a 2-1 decision that is contrary to decisions of this Court and every other court of appeals to address the issue, that the claims might be addressed in a subsequent appeal from a different immigration proceeding.

B. Administrative Scheme

Because the court of appeals' decision misconstrues a critical jurisdictional

provision concerning judicial review of immigration decisions, it is necessary to describe briefly the administrative scheme governing adjustment of status to permanent resident alien.

Permanent resident status is the first step toward naturalization. A nonimmigrant alien in the United States who has the requisite close family ties may apply for adjustment of status to permanent resident. 8 U.S.C. §1255(a). A permanent resident alien has the right to live in the United States permanently, subject to deportation for various enumerated offenses. One must generally be a permanent resident for at least three years to become eligible to apply for naturalization. 8 U.S.C. §1430(a); 8 U.S.C. §1427(a).

The Immigration and Nationality Act ("Act") provides aliens living in the

United States two separate and independent opportunities to apply for adjustment of status to permanent resident: the first to a District Director, and the second to an immigration judge in a deportation proceeding. 8 C.F.R. §245.2. This lawsuit challenges only the District Director's decision.

Upon receiving an application, the District Director conducts an interview with the applicant, reviews relevant documents, and renders a written decision. The District Director's decision is administratively final. 8 C.F.R. §245.2(a)(5)(ii). Judicial review of the District Director's denial is available in district court under 8 U.S.C. §1329 and 28 U.S.C. §1331, and it was pursuant to these statutes that petititioners filed this suit. Cheng Fan Kwok v. INS, 392 U.S. 206,

210 (1968); Jaa v. U.S. INS, 779 F.2d 569, 571 (9th Cir. 1986); App. 109a-114a (and cases cited therein).

Once the District Director denies an application for adjustment of status, the alien may be subject to deportation proceedings. If the INS moves to deport the alien, the Act affords the alien a second and independent opportunity to apply for adjustment of status in the deportation proceeding before an immigration judge. The immigration judge's decision is appealable to the Board of Immigration Appeals (BIA). However, neither the immigration judge nor the BIA may review the District Director's prior denial. 8 C.F.R. 245.2(a)(5)(ii); 8 C.F.R. §3.1(b); Sadegh-Nobari v. INS, 676 F.2d 1348, 1350 (10th Cir. 1982); cf. Fleurinor v. INS, 585 F.2d 129, 135 (5th Cir. 1978).

If the BIA issues an order of deportation, that order is appealable to a court of appeals under §106(a) of the Act, 8 U.S.C. §1105a(a). Until the D.C. Circuit's 2-1 decision in this case, the courts had uniformly held that a District Director's prior decision on adjustment of status could not be reviewed in a §106(a) appeal, and could only be reviewed in an action filed initially in district court.

C. Prior Proceedings

1. District Director Decision

Ms. Randall applied to the District Director for adjustment of status in 1984. After reading five of Ms. Randall's more than forty books, the District Director denied her application on October 2, 1985 because he found that her "writings go far

beyond mere dissent." App. 73a.[1] As examples, he quoted Ms. Randall's criticism of U.S. involvement in the Vietnam War and of the National Guard's shooting of four students at Kent State University. App. 61a, 67a. The District Director gave Ms. Randall until October 30, 1985 to leave the country. App. 22a.

The statutory criteria for adjustment of status to permanent resident alien do not require an applicant's writings to fall within the bounds of "mere dissent." 8 U.S.C. §1255(a). Adjustment of status has never before been denied on such grounds. The District Director justified his unprecedented reliance on this criteria as

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[1]The District Director's decision is reprinted in full as an Appendix to the majority opinion in the court of appeals. App. 53a-74a.

a "matter of discretion." App. 74a.[2]

2. District Court Proceedings

Petitioners filed this lawsuit in district court on October 28, 1985, less than one month after the District Director's decision, and two days before the date the District Director had set for Ms. Randall's departure. They did so because there was no other means to review the District Director's decision. Under INS regulations, "[n]o [administrative] appeal lies from the denial of an application [for adjustment of status] by

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[2]Adjustment of status is one of several kinds of "discretionary relief" available under the Act. It is termed "discretionary" because even when an alien demonstrates statutory eligibility, the INS may grant or deny adjustment as a matter of discretion. Discretionary denials are ordinarily based on such "adverse factors" as misrepresentations in applications for entry, recent criminal convictions, or deliberate and repeated violations of immigration laws. 2 C. Gordon and H. Rosenfeld, Immigration Law and Procedure §7.7d at 7-99 to 7-103 (1987).

the District Director." 8 C.F.R. §245.2(a)(5)(ii).

Petitioners sought judicial relief: (1) declaring that the District Director's decision was unconstitutional and contrary to law; and (2) requiring the District Director to grant Ms. Randall's application retroactively, or to reconsider it retroactively within constitutional and statutory limits.

After petitioners' suit was filed, defendants instituted deportation proceedings against Ms. Randall. App. 97a. Defendants then moved to dismiss this case, arguing that their institution of deportation proceedings had divested the district court of jurisdiction to review the District Director's decision. App. 97a-98a.

Petitioners cross-moved for partial

summary judgment and a preliminary injunction. They argued that the District Director's discretion does not authorize him to base a denial on his subjective judgment of whether an applicant's writings go "beyond mere dissent," and that by doing so, the District Director violated petitioners' First Amendment rights.[3]

The district court rejected as "myopic" defendants' argument that the court had been divested of jurisdiction, (App. 109a), but dismissed the case as moot. It

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[3]Aliens living in the United States are protected by the First Amendment. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953); Bridges v. Wixon, 326 U.S. 135, 148 (1945); see also United States v. Verdugo-Urquidez, 856 F.2d 1214, 1222 (9th Cir. 1988); Parcham v. INS, 769 F.2d 1001, 1004 (4th Cir. 1985); American-Arab Anti-Discrimination Committee v. Meese, Slip Op., No. CV-87-02107-SVW (C.D. Cal. Jan. 26, 1989). Petitioners maintained that it is inconsistent with the First Amendment to permit a government official to deny a valuable benefit on the basis of his discretionary assessment of the political character of an applicant's writings.

reasoned that a subsequent decision by an immigration judge in the deportation proceeding that INS initiated after the federal suit was filed had afforded Ms. Randall all "the fair consideration she warrants." App. 120a. The deportation proceeding to which the district court pointed would not have been initiated but for the District Director's allegedly unconstitutional denial of Ms. Randall's application for permanent resident status. Moreover, the immigration judge did not purport to, and lacked the authority to, review the District Director's denial at issue in the district court. The immigration judge denied Ms. Randall's application for adjustment of status, on different grounds, and found her

deportable.[4]

4. D.C. Circuit Decision

The court of appeals did not accept either the defendants' jurisdictional divestment argument or the district court's analysis that the case was moot. It nonetheless affirmed the dismissal, on the ground that the matter was not ripe. App. 45a-47a. It based this holding on a determination, contrary to holdings of this Court and every court of appeals to address the subject, that Ms. Randall could challenge the District Director's decision later, in a court of appeals under 8 U.S.C.

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[4]The immigration judge found Ms. Randall statutorily ineligible for adjustment of status, because he concluded that her writings advocated the "doctrines of world communism," which therefore rendered her excludable under 8 U.S.C. §1182(a)(28)(G)(v). App. 119a n.8. The immigration judge's determination is not binding on any other INS official, including the District Director. The immigration judge's decision is on appeal to the BIA. App. 25a.

§1105a(a). App. 29a-30a.[5]

Judge Mikva dissented, correctly concluding that "Randall has been injured by the district director's decision in a manner that cannot be fully remedied by the

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[5]The court of appeals emphasized at the outset of its opinion that because of then-recent developments, it appeared that Ms. Randall was assured of obtaining at least prospective permanent resident status. App. 6a. This is no longer the case.

When the court issued its opinion, Section 901 of the Foreign Relations Authorization Act, Pub. L. No. 100-204, §901(a), 101 Stat. 1399, 1399-1400 (1987) barred the executive from denying permanent resident status because of "any past, current, or expected beliefs, statements, or associations." At oral argument before the court of appeals, the INS conceded that this law applied to Ms. Randall. App. 6a n.3. After the court of appeals issued its decision, however, in October 1988, Congress amended Section 901, limiting its protections to aliens seeking non-permanent visas. Foreign Operations Appropriations Act, Pub. L. No. 100-461, §555, 102 Stat. 2268 (1988). As a result, the INS revoked its previous position, and now maintains again that Ms. Randall should be denied permanent resident status and deported because of the political content of her writings. The court of appeals denied the petition for rehearing before learning of this change in the INS's position.

appeals path toward which the majority has directed her." App. 87a. He found that the District Director's decision was clearly unconstitutional. App. 77a-78a. And he reasoned that because neither the immigration judge, nor the BIA, nor a court of appeals under §106(a), can review the District Director's decision, the appeals route cited by the majority cannot provide Ms. Randall with the relief she seeks -- permanent resident status retroactive to the time of the District Director's unconstitutional denial, October 2, 1985. App. 87a.[6] Thus, even if Ms. Randall were

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[6]If petitioners are correct that the District Director's denial was unconstitutional, and if upon reconsideration within constitutional limits it is determined that the application should have been granted, Ms. Randall would be entitled to permanent resident status retroactive to the date of the District Director's decision -- October 2, 1985. App. 88a-90a. This would have the effect of terminating the deportation proceedings which the District Director initiated against her.

to prevail before the BIA or a court of appeals with regard to her order of deportation, she will remain irreparably injured by the District Director's denial. App. 90a-91a. Judge Mikva would have remanded with instructions that the District Director reconsider Ms. Randall's application within constitutional limits. App. 92a-93a.

The INS conceded that Ms. Randall cannot obtain retroactive resident status in her appeal from the deportation proceeding. Appellees' Supplemental Statement (filed Feb. 16, 1988). This Court has held that an alien has a cognizable interest in retroactive resident status even if he or she already has prospective resident status, because the waiting period for naturalization commences on the effective date of permanent resident status. INS v. Cardozo-Fonseca, 107 S. Ct. 1207, 1210 n.3 (1987); INS v. Chadha, 462 U.S. 919, 937 n.10 (1983). Ms. Randall to this date does not even have prospective resident status, and is still facing an order of deportation.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision is premised on an interpretation of the jurisdictional scope of §106(a) that conflicts with established precedent from this Court, other Circuits, and its own prior decisions. Certiorari should be granted to resolve this conflict, which, as a jurisdictional question, affects every application for adjustment of status. See, e.g., New York v. Saper, 336 U.S. 328, 328 (1949) (certiorari granted to resolve conflict going to the administration of the Bankruptcy Act).

The court's jurisdictional error effectively denies petititioners any judicial forum for review of patently unconstitutional action, which itself raises "a serious constitutional question." Webster v. Doe, 108 S. Ct. 2047, 2053

(1988). For these reasons, a writ of certiorari should be granted.

I. THE COURT OF APPEALS' DETERMINATION THAT MS. RANDALL'S CHALLENGE TO THE DISTRICT DIRECTOR'S DECISION MAY BE REVIEWED UNDER §106(a) CONFLICTS DIRECTLY WITH DECISIONS OF THIS COURT AND EVERY OTHER COURT OF APPEALS TO ADDRESS THE ISSUE

The D.C. Circuit's 2-1 decision is contrary to decisions of this Court and every other court of appeals that has addressed the scope of §106(a), which prescribes the jurisdiction of the courts of appeals to review final orders of deportation. 8 U.S.C. §1105a(a). The D.C. Circuit decided that this case was not ripe because petitioner Margaret Randall's

> substantive pleas...[are] still open for judicial review at a later time -- when a final order has been made by the Board of Immigration Appeals -- and in another place -- in the judicial circuit in which the El Paso district director and immigration judge proceeded, or the judicial circuit in which Randall resides.

See 8 U.S.C. §1105a(a)(2).

App. 30a. Thus, the court repeatedly assured Ms. Randall that it was not foreclosing but only delaying review of her "substantive pleas." App. 48a-50a.

Every court to address the issue, however, including the two circuits to which the D.C. Circuit has directed Ms. Randall, has held that the "substantive plea" Ms. Randall raises -- namely, a challenge to the District Director's denial of her application for adjustment of status to permanent resident alien -- cannot be reviewed by a court of appeals under §106(a), and must be reviewed by an action originally filed in district court, as petitioners filed here. The court of appeals fails even to discuss the jurisdictional conflict raised by its conclusion, and makes no attempt to

distinguish the controlling precedent from which it radically departs.

The effect of the court of appeals' decision in this case is to deny Ms. Randall any forum whatsoever for her challenge to the District Director's action. The D.C. Circuit has declined to review her challenge to the District Director's denial on the premise that another court of appeals can review it under §106(a). But both of the other circuits which will have jurisdiction over Ms. Randall's §106(a) appeal have held, following this Court, that a District Director's denial of discretionary relief such as adjustment of status cannot be reviewed in a §106(a) appeal. Che-Li Shen v. INS, 749 F.2d 1469, 1472 (10th Cir. 1984); Shoja v. INS, 679 F.2d 447, 450 (5th Cir. 1982); Fleurinor v. INS, 585 F.2d at

135-36. Thus, Ms. Randall is left with no forum to review patently unconstitutional action harming her.

In Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), this Court held that a District Director's denial of discretionary relief -- in that case a stay of deportation -- could not be reviewed under §106(a), because:

> the judicial review provisions of §106(a) embrace only those determinations made during a proceeding under §242(b), including those determinations made incident to a motion to reopen such proceedings.

Cheng Fan Kwok, 392 U.S. at 216 (emphasis added).[7]

A District Director's discretionary denial of a stay of deportation, the Cheng

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[7]A "proceeding under section 242(b)" is a deportation proceeding. 8 U.S.C. §1252(b). Deportation proceedings are presided over by immigration judges, also referred to as "special inquiry officers."

Fan Kwok Court reasoned, results from "proceedings entirely distinct from those conducted under §242(b)," and is issued by a District Director, "an officer other than the special inquiry officer who, as required by §242(b), presided over the deportation proceeding." Id. at 213. Judicial review of the District Director's order must therefore be sought initially in district court. Id. at 210.[8]

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[8]If a final adverse decision of INS is not reviewable in the court of appeals under §106(a), it is reviewable in district court under 8 U.S.C. §1329 or 28 U.S.C. §1331. Cheng Fan Kwok, 392 U.S. at 210; INS v. Stanisic, 395 U.S. 62, 68 n.6 (1969); Olaniyan v. District Director, INS, 796 F.2d 373, 376-77 (10th Cir. 1986). In Cheng Fan Kwok, 392 U.S. at 217, the Court recognized that this would mean that immigration litigation would sometimes proceed on two tracks:

> The result we reach today will doubtless mean that, on occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless ... it is the result that we believe most consistent both with

The same analysis applies here. As with the stay order at issue in Cheng Fan Kwok, the District Director's denial of Ms. Randall's adjustment of status application resulted from "proceedings entirely distinct from those conducted under §242(b)," and was issued by "an officer other than the special inquiry officer who...preside[s] over the deportation proceeding." Thus, the D.C. Circuit's determination that Ms. Randall may

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> Congress' intentions and with the terms by which it chose to express those intentions.

District courts have often reviewed District Directors' denials of adjustment of status. See, e.g., Jaa v. U.S. INS, 779 F.2d 569, 571 (9th Cir. 1986) (appeal from district court review); Salehpour, 761 F.2d 1442 (9th Cir. 1985) (same); Ali v. INS, 661 F. Supp. 1234 (D. Mass. 1986); Hassanali v. Attorney General, 599 F. Supp. 189, 192 (D.D.C. 1984); Noori-Khajavi v. INS, 548 F. Supp. 150 (E.D. Mo. 1982); Galvez v. Howerton, 503 F. Supp. 35 (C.D. Cal. 1980); Moge v. Morris, 470 F. Supp. 556, 557 n.2 (E.D. Pa. 1979); Nasan v. INS, 449 F. Supp. 244, 247 (N.D. Ill. 1978).

challenge the District Director's decision later under §106(a) is directly contrary to Cheng Fan Kwok.[9]

Every other court to confront the issue of reviewability of District Directors' denials of discretionary relief has followed Cheng Fan Kwok. Most recently, the Ninth Circuit held that a District Director's denial of adjustment of status is not reviewable in the court of appeals under §106(a), and is only reviewable in an action filed in district court. Jaa v.

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[9]An application for a stay of deportation is procedurally indistinguishable from an application for adjustment of status. The alien applies first to a District Director, who may grant or deny the application in his discretion. The District Director's decision is administratively final. 8 C.F.R. § 243.4. As with adjustment, the alien has a second separate and independent opportunity to seek a stay from the immigration judge, and the immigration judge's decision is appealable to the BIA and the court of appeals. Id. The District Director's decision, however, may not be reviewed except by an action in district court. Reyes v. INS, 571 F.2d 505, 507 n.1 (9th Cir. 1987).

U.S. INS, 779 F.2d at 571; see also Che-Li Shen v. INS, 749 F.2d at 1472 (District Director's denial of adjustment of status "not reviewable" under §106(a)).[10]

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[10]With the exception of the D.C. Circuit's decision, the courts have consistently applied Cheng Fan Kwok to all District Director's decisions on applications for discretionary relief issued outside of a deportation proceeding. See INS v. Stanisic, 395 U.S. at 68 n.6 (District Director's denial of application for parole reviewable in district court, not court of appeals under §106(a), "because the ... determination was not pursuant to §242(b)"); Sadegh-Nobari v. INS, 676 F.2d at 1350 (court of appeals lacks jurisdiction to review District Director's denial of change of status application, because it "was not a proceeding under §242(b) nor did it challenge a final order of deportation"); Ibrahim v. U.S. INS, 821 F.2d 1547, 1549 (11th Cir. 1987) (court of appeals lacks jurisdiction under §106(a) to review District Director's denial of application for waiver of residence requirement); Olaniyan v. District Director, INS, 796 F.2d at 376-77 (District Director's denial of employment authorization); Conti v. INS, 780 F.2d 698, 701-02 (7th Cir. 1985) (District Director's denial of immediate relative visa petition in connection with application of adjustment of status); Fatehi v. INS, 729 F.2d 1086, 1088 (6th Cir. 1984) (District Director's denial of request to transfer schools); Torabpour v. INS, 694 F.2d 1119, 1121 (8th Cir. 1982) (District Director's denial of extension of stay); Ghorbani v. INS,

The INS also follows Cheng Fan Kwok, and maintains that District Directors' denials of discretionary relief are not reviewable under §106(a), and must be reviewed in district court. As one court recently summarized the INS' view:

> INS argues that motions to reopen deportation proceedings are always within section 106(a); motions addressed

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686 F.2d 784, 787 (9th Cir. 1982) (District Director's denial of request to reinstate student status); Shoja v. INS, 679 F.2d at 450 (District Director's denial of request to transfer schools); Butterfield v. INS, 409 F.2d 170, 173 (D.C. Cir. 1969) (District Director's denial of reclassification of status).

INS v. Chadha, 462 U.S. 919 (1983), does not alter the analysis, as the post-Chadha decisions above demonstrate. Chadha reaffirmed Cheng Fan Kwok, but held that where an alien challenged a "final deportation order" under §106(a), he could also challenge a legislative veto provision that was an integral part of the deportation order, because it was a "matter[] on which the validity of the final order is contingent." 462 U.S. at 938. Because Cheng Fan Kwok was not overruled, this language does not extend to denials of discretionary relief by District Directors issued outside of deportation proceedings. See, e.g., Ibrahim, 821 F.2d at 1549 n.3; Fatehi, 729 F.2d at 1088; Ghorbani, 686 F.2d at 787, 791.

> to district directors (like the stay motion in Cheng Fan Kwok) are outside section 106(a) and must be appealed to a district court....On this point, we think the INS is correct.

Williams v. INS, 795 F.2d 738, 743 (9th Cir. 1986); accord, Manarolakis v. Coomey, 416 F. Supp. 532, 534 n.1 (D. Mass. 1976).[11]

Thus, the D.C. Circuit's decision is contrary not only to decisions of this

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[11]There was a time when the INS argued the position now adopted sua sponte by the court of appeals. In 1969, the INS argued in Cheng Fan Kwok that "§106(a) should be understood to embrace all determinations 'directly affecting the execution of the basic deportation order,' whether those determinations have been reached prior to, during or subsequent to the deportation proceeding." 392 U.S. at 210 (quoting Brief for Respondent at 28). The Supreme Court rejected that construction. 392 U.S. at 215. In 1971, the INS proposed a similarly broad proposition to Congress in an attempt to amend §106(a) to cover all deportation-related decisions. H.R. 2328, 92nd Cong. 1st Sess. §7 (1971), discussed in Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 33 (1975). The INS proposal failed. Thus, the D.C. Circuit has resurrected a position that both this Court and Congress have expressly rejected.

Court and other Circuits, but also to the construction maintained by the agency responsible for implementing the Act.[12] Certiorari should be granted to resolve this split. A uniform rule is required, so that Ms. Randall, and others in her position, can know where, if anywhere, an allegedly unconstitutional District Director's decision is to be challenged. Commissioner v. Bilder, 369 U.S. 499, 501 (1962) (granting certiorari because of conflict and necessity for a uniform rule).

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[12]This conflict underscores the propriety of a writ of certiorari. Morton v. Ruiz, 415 U.S. 199, 201-02 (1974) (certiorari granted where court's decision inconsistent with construction of the administrative agency charged with the statute's enforcement).

II. BECAUSE THE COURT OF APPEALS' DECISION EFFECTIVELY INSULATES A GOVERNMENT OFFICIAL'S ALLEGEDLY UNCONSTITUTIONAL ACTION FROM ANY JUDICIAL REVIEW, IT RAISES IMPORTANT AND UNRESOLVED CONSTITUTIONAL PROBLEMS

The D.C. Circuit's decision is somewhat ambivalent in its analysis. While its ripeness determination turned on its conclusion that Ms. Randall can raise her "substantive pleas" in a later §106(a) appeal, it also suggested, in a footnote, that the District Director's decision may not be appealable at all. App. 50a n.16. Yet it did not dismiss the case for lack of subject-matter jurisdiction, which would be required if it held the District Director's decision not reviewable, but instead held the matter not ripe for review.

Whichever way the D.C. Circuit's decision is read, it effectively denies Ms. Randall any judicial forum for her constitutional claim, because the Circuits

to which it has directed her cannot review her claim. The D.C. Circuit's decision thereby raises a "'serious constitutional question.'" Webster v. Doe, 108 S. Ct. at 2053 (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)). To foreclose review of petitioners' constitutional claim conflicts with the well-established principle that "[f]ederal injunctive relief is presumed available against federal actors committing constitutional violations." Reuber v. United States, 750 F.2d 1039, 1061 (D.C. Cir. 1984); see also Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).[13]

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[13]Defendants argued below that it is sufficient for Ms. Randall to have an opportunity to challenge the immigration judge's denial of her adjustment of status application. But that is not sufficient. First, even if Ms. Randall were able to show that the immigration judge's decision were unconstitutional, that would not entitle her to adjustment of status retroactive to the District Director's decision, rendered

This Court strongly reaffirmed only last term that courts should be exceedingly reluctant to preclude all judicial review of a constitutional claim. Webster v. Doe, 108 S. Ct. at 2053 (holding that Attorney General's otherwise absolute and unreviewable discretion in hiring for CIA was subject to judicial review for colorable constitutional claims). Thus, even where statutes on their face bar judicial review of a government official's action, the Court has interpreted them to permit review of constitutional claims. Johnson v. Robison, 415 U.S. 361, 367-73 (1974) (noting that if veterans' benefit

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almost a year earlier, and on different grounds. Second, that result would effectively insulate District Directors from any review of their actions. Finally, if Ms. Randall is correct that the District Director denied her adjustment application for unconstitutional reasons, she should never have been subjected to a deportation proceeding at all.

statute were interpreted to bar federal courts from hearing constitutional challenges, it would "raise serious questions concerning [its] constitutionality," and finding exception for judicial review of constitutional claims).

The effect of the D.C. Circuit's decision on Ms. Randall is precisely to deny her any forum for her constitutional challenge to the District Director's decision. If read to deny all review of District Directors' denials, even where, as here, their actions are patently unconstitutional, the court of appeals' decision would permit District Directors to deny adjustment applications not only on the basis of the political content of an alien's writings, but also on the basis of the alien's sex or race.

CONCLUSION

For all of the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 21, 1989

APPENDIX

APPENDICES

1. Majority Opinion of D.C. Circuit 1a

2. District Director Decision (reproduced as appendix to Majority Opinion) 53a

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 4, 1988 Decided August 16, 1988

No. 87-5230

MARGARET J. RANDALL, et al., APPELLANTS

v.

EDWIN MEESE, III, ATTORNEY GENERAL, et al.

Appeal from the United States District Court for the District of Columbia

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David Cole, with whom Michael Ratner, Walter J. Rockler, Cynthia M. Lewin, and Michael Maggio were on the brief for appellants.

Michael L. Martinez, Assistant U.S. Attorney, with whom Joseph E. diGenova, U.S. Attorney, John D. Bates and R. Craig Lawrence, Assistant U.S. Attorneys, were on the brief for appellees. Michael J. Ryan and Royce C. Lamberth,* Assistant U.S. Attorneys, also entered appearances for appellees.

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*At time brief was filed.

Ann H. Franke was on the brief for amicus curiae, American Association of University Professors, et al. urging reversal.

Before: MIKVA, RUTH B. GINSBURG, and SILBERMAN, Circuit Judges.

Opinion for the court filed by Circuit Judge RUTH B. GINSBURG.

Dissenting opinion filed by Circuit Judge MIKVA.

GINSBURG, RUTH B., Circuit Judge: Plaintiff-appellant Margaret J. Randall is a noted writer and photographer; born in New York in 1936 and raised in this country, she lost her United States citizenship in 1966 when she declared her allegiance to Mexico. Her parents are citizens of the United States residing, since 1947, in Albuquerque, New Mexico; her four children are also United States citizens. Randall seeks an adjustment of her immigration status to that of a permanent resident so that she may again become a United States citizen. she has so

far been denied that relief by the Immigration and Naturalization Service (INS or Immigration Service). We hold that her resort to court is premature, and we therefore affirm the district court's judgment dismissing her complaint. The dismissal, we emphasize, is without prejudice to eventual renewal of Randall's claims, in a proper circuit, including her contention that her status should be adjusted as of October 2, 1985, the date the district director denied her application.

I. INTRODUCTION

Margaret Randall's pleas for authorization to remain in the United States permanently commenced in 1984; Immigration (McCarran-Walter) Act[1]

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[1]Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (current version at 8 U.S.C. §1101 (1982)).

prescriptions then in effect authorized the executive branch, if specified terms are met, to exclude aliens on ideological grounds. See 8 U.S.C. §1182(a)(28) (1982) (rendering excludable aliens who believe in communism or anarchism, write about those doctrines, or belong to an organization that promotes those doctrines); see generally Shapiro, Ideological Exclusion: Closing the Border to Political Dissidents, 100 Harv. L. Rev. 930 (1987). The law of the United States, as ordered by Congress for 1988, has changed. It is now impermissible to deny a visa or an application for permanent resident status "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution." Foreign Relations

Authorization Act, Pub. L. No. 100-204, §901(a), 101 Stat. 1399, 1399-1400 (1987).[2]

Randall's case is thus set in a time of transition. The government once opposed her application for permanent residency on

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[2]The proscriptions of section 901(a) are temporary; they apply only to

(1) applications for visas submitted during 1988;

(2) admission sought after December 31, 1987, and before March 1, 1989; and

(3) deportations based on activities occurring during 1988 or for which deportation proceedings (including judicial review with respect to such a proceeding) are pending at any time during 1988.

Foreign Relations Authorization Act, Pub. L. No. 100-204, §901(d), 101 Stat. 1400.

A pending bill, H.R. 4427, 100th Cong., 2d Sess., 134 Cong. Rec. H2171 (daily ed. Apr. 20, 1988), would render the proscriptions of section 901(a) a permanent part of the Immigration and Nationality Act through comprehensive amendment of the grounds for excluding and deporting aliens.

the ground that her writings advocated the doctrines of world communism and therefore made her excludable under section 1182(a)(28). That ground is not currently available to the executive. See Allende v. Shultz, 845 F.2d 1111, 1121 (1st Cir. 1988). It therefore appears that the large question initially raised--whether Margaret Randall could regain United States citizenship--is now reduced to the question-when can she regain it.[3]

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[3]At oral argument, Michael L. Martinez, representing the government, said:

> [W]e believe[] ... based on section 901 of the new law that Congress ha[s] repealed the application of sections [1182(a)(28)](G) and [(G)](v) ... to persons whose deportation proceedings were pending during 1988 and ... we believe that that on its face applies to Mrs. [sic]

To render comprehensible the conundrum this appeal presents, we first describe the statutory and regulatory complex relevant to status adjustment applications, and then set out the significant facts and procedure history in Randall's case.

II. THE ADJUSTMENT OF STATUS REGIME

Before 1935, neither statute nor administrative practice permitted adjustment of the status of an alien already in the United States; to achieve reclassification from nonimmigration to permanent resident status, the alien had to

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> Randall's case.... The INS has decided within the context of the [Board of Immigration Appeals] that they [sic] will not oppose application of 901 to [Randall] in [deportation] proceedings.

leave the country and, in the ordinary course, apply to a United States consular officer abroad for an immigration visa. See 8 U.S.C. §202(a) (1934); Centeno v. Shultz, 817 F.2d 1212, 1214 (5th Cir. 1987) cert. denied, 56 U.S.L.W. 3459 (U.S. Jan. 9, 1988) (adhering to position that "decisions of United States consuls on visa matter are nonreviewable by the courts").

To reduce the hardship and inconvenience of this "depart and seek reentry" procedure, the Immigration Service devised a "pre-examination plan" which made accessible to some aliens a less expensive process: after screening by immigration officials here, the alien could travel briefly to Canada and there acquire from a United States consular officer the sought-after immigrant visa. See S. Rep. 1515, 81st Cong., 2d Sess. 603 (1950); 8 C.F.R.

§142 (Supp. 1941). If the alien, once in Canada, failed to pass the consular officer's checks, he would be sent back to the United States, pursuant to an agreement with Canada; promptly upon his return, deportation proceedings would be instituted against him. See 8 C.F.R. §142.18 (Supp. 1941). The alien would have no opportunity, in those proceedings, to gain a status adjustment.

In 1952, in the new Immigration and Nationality Act, Congress itself addressed the matter. Section 245 of the Act, codified at 8 U.S.C. §1255, enabled an alien, under specified conditions, to obtain an immigrant visa "without the necessity of leaving the United States." See H.R. Rep. 2096, 82d Cong., 2d Sess. 128 (1952). The prescription currently in force permits

> [t]he status of an alien who was inspected and admitted or paroled into the United States [to] be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. §1255(a); see Jain v. INS, 612 F.2d 683, 687 (2d Cir. 1979) ("adjustment of status under 245" is "extraordinary relief," therefore burden is on alien to persuade Immigration Service "to exercise its discretion favorably"), cert. denied, 446 U.S. 937 (1980); see also T. Aleinikoff & D. Martin, Immigration Process and Policy, 282-83, 288-92 (1985).

By thus authorizing the Attorney

General (and, under his delegation, Immigration Service officers) to grant permanent resident status, Congress afforded aliens present in this country on nonimmigrant visas a marked advantage over the alien who could receive an immigrant visa only from a consular officer abroad. The alien in the United States, through the regulations implementing the congressional prescription, now has dual opportunities to seek permanent resident status. First, he may apply for relief to "the district director having jurisdiction over his place of residence." 8 C.F.R. §245.2(a)(1). Should the alien fail to gain adjustment at this stage, he is entitled to a de novo review of his application in the context of deportation proceedings. See 8 C.F.R. §§242.17(a), 245.2(a)(5)(ii).

Proceedings before the district

director may be summary. Service instructions state:

> Unless a case involves complex questions of fact or law, the adjudicator shall complete an interview of an individual or family group within a period of 15-30 minutes. In no event may an interview exceed 30 minutes without the authority of a supervisory immigration examiner.

INS Operation Instructions 245.36, reprinted in 4 C. Gordon & H. Rosenfeld, Immigration Law and Procedure at 25-251 (1987). Reflecting the abbreviated course this first process may take, and the prospect of a second, closer look, the regulations preclude a direct administrative appeal from a district director's denial of a status adjustment application. 8 C.F.R. §245.2(a)(5)(ii).

Unlike the alien of an earlier day whose sole recourse was to a consular officer abroad, however, the alien in the

United States seeking status adjustment today may obtain full consideration of his application in deportation proceedings. See 8 C.F.R. §§242.17(a), 245.2(a)(5)(ii); see also Jain v. INS, 612 F.2d at 689 (finding "without merit" argument that alien seeking status adjustment was denied due process because he was unable to appeal [district director's] denial of his ... application directly and could only do so in the context of deportation proceedings"). At this stage, the alien is accorded a plenary hearing; he has the right to be represented by counsel, to introduce evidence, and to cross-examine. 8 U.S.C. §1252(b); 8 C.F.R. §242.16. If the immigration judge rules against the alien, he may appeal to the Board of Immigration Appeals, 8 C.F.R. §§236.7, 242.21, and thereafter, by prescription of

the Act itself, to a court of appeals. 8 U.S.C. §1105a(a). Of prime significance to our resolution of this appeal, the statute sets the venue of a judicial review petition in "the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted ... or in the judicial circuit wherein is the residence ... of the petitioner, but not in more than one circuit[.]" 8 U.S.C. §1105a(a)(2).

III. FACTS AND PROCEDURAL BACKGROUND

Appellant Randall left the United States in 1961 and continued to reside abroad until 1984. She lived first in Mexico and became a citizen of that country; in 1969 she moved to Cuba and in 1980, to Nicaragua. During the years she resided and traveled outside the United

States, she experienced and wrote about social change and revolution in third world nations. Randall studied particularly the position and problems of women in those countries. Returning to the United States on a visitor's visa in January 1984, she filed an application for permanent resident status two months later. Randall has been living, since her return, in Albuquerque, New Mexico; her residence there is close to that of her now elderly parents. She gained employment as a professor at the University of New Mexico, serving in the Department of American Studies and the Women's Studies program.

It is undisputed that Randall meets the first and third of the three conditions enumerated in 8 U.S.C. §1255(a) for adjustment of status to that of an alien lawfully admitted for permanent residence:

(1) she was inspected and admitted or paroled into the United States and has made an application for status adjustment; (3) and immigrant visa is immediately available to her based on the petition of her United States citizen son, Gregory Jason Randall. See 8 U.S.C. §1255(a)(1), (3).[4] We turn now to the administrative proceedings Margaret Randall has thus far encountered-the first before an INS district director, the second in a deportation setting-and the treatment in those proceedings of the central criterion, numbered (2) in the section 1255(a) listing: Randall's eligibility to receive an immigrant visa as an alien "admissible to the United States

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[4]A citizen may file a petition for adjustment of the immigration status of his "immediate relative." Under the Immigration Act's definition, 8 U.S.C. §1151(b), only "children, spouses, and parents of a citizen of the United States" can qualify for "immediate relative" status.

for permanent residence." 8 U.S.C. §1255(a)(2).

A. The District Director's October 2, 1985 Decision

The Immigration Act, we pause to note, sets out thirty-three classes of aliens "ineligible to receive visas"; persons falling within those classes (or subclasses) are, in the Act's words, "excluded from admission into the United States." 8 U.S.C. §1182(a). The INS district director in El Paso, functioning as the Attorney General's delegate, see 8 C.F.R. §245.2, ruled in October 1985 on Randall's March 1984 status adjustment application. Looking to section 1182(a), the district director identified as the focus of his attention only one "excluded from admission" category:

> Aliens who write or publish, or cause to be written or published,

> or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or displayed, any written or printed matter, advocating or teaching ... (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship[.]

8 U.S.C. §1182(a)(28)(G)(v).[5]

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[5]Although the District Director set out only subsection 1182(a)(28)(G), the tenor of his decision suggests that he also had in mind another "excluded for admission" category:

> Aliens who are members or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any

The district director reported that five of Margaret Randall's books had been examined in the light of subsection 1182(a)(28)(G)(v). That examination, the district director endeavored to show through illustrative quotations, revealed Randall's exuberant praise of Fidel Castro and the Cuban Revolution, her applause for the "Vietnamese victory," and her condemnation of the United States. Summing

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> political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt[.]

8 U.S.C. §1182(a)(28)(C).

up, the district director stated that, although Randall had denied membership in the Communist Party,

> [b]y her own admission, [she] has made speeches for The [sic] Communist Party. Her books advocate the doctrines of communism and support the Communist governments of Cuba, Vietnam and Nicaragua from 1966 to 1981.

However, the district director did not then return to his starting line. He did not restate, and this time answer, the question whether, within the meaning of 8 U.S.C. §1182(a)(28)(G)(v), Randall had published writing advocating "the economic, international, and governmental doctrines of world communism." Instead, he said:

> Benefits under [8 U.S.C. §1255] are discretionary. There are numerous decisions relating to the discretionary authority of the Attorney General in the adjudication of applications for adjustment of status. [Citations to string of administrative decisions omitted.] All of these

> decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under [§1255], the grant of an application is a matter of discretion and administrative grace.

The district director denied Randall's application with this concluding comment:

> The record of the applicant is self-evident. She has failed to show that she is clearly and beyond a reasonable doubt entitled to the benefits for which she has applied. Her activities and writings for nearly the past 20 years speak for themselves. Her writings go far beyond mere dissent, disagreement with, or criticism of the United States or its policies. Her associations with, and her activities and writings in support of the communist dominated governments of Cuba, North Vietnam, and Nicaragua; and her advocacy and support of revolutionary activity in Mexico, as well as her affiliation with and participation in Communist Party activities, warrant the denial of her application for adjustment of status as a matter of discretion.

The director granted Randall the privilege

of departing voluntarily from the United States by October 30, 1985.[6]

B. The Immigration Judge's August 28, 1986 Decision

On November 7, 1985, one week after Randall's time to depart voluntarily had expired, the Immigration Service issued an order to show cause why she should not be deported. See 8 C.F.R. §242.1. As part of her response to this INS initiative, Randall again sought adjustment of her status.

The immigration judge presiding at the deportation hearing surveyed Randall's

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[6]A deportable alien may be accorded permission to depart voluntarily. 8 U.S.C. §1252(b). In addition to avoiding the stigma of compulsory expulsion, an alien granted this privilege is not subject to the felony prosecution that deported aliens face who return without permission within five years of their deportation. See 8 U.S.C. §1326. An alien who voluntarily departs may also choose his destination.

activities abroad, and particularly her writings. Like the district director, the immigration judge pointed up Randall's "praise for the communist North Vietnamese victory," and her constant "support of the Castro communist revolution." Based on a "full[] reading ... [of Randall's] literature,"[7] the immigration judge concluded in his August 1986 decision that "portions of [her] various writings advocate the economic, international, and governmental doctrines of world communism"' hence, he determined, subsection 1182(a)(28)(G)(v) (set out supra pp. 8-9) placed her in an "excluded from admission" category,[8] and that placement rendered her

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[7]The immigration judge reported that the reading and study encompassed "in their entirety" 2,744 pages of Randall's writings.

[8]The immigration judge specifically ruled, however, that the evidence did not suffice to place Randall in any "excludable

ineligible for a status adjustment.

In contrast to the district director, however, the immigration judge squarely addressed and sharply distinguished the question whether Randall was statutorily eligible to receive a visa from the question whether it would be appropriate to exercise discretion in her favor. As to the latter, the immigration judge observed:

> [A]ccording evidentiary weight to [Randall's] non-proscribed political opinions would result in the political opinion of the adjudicating officer being the determinative factor. Clearly the favorable or unfavorable exercise of discretion cannot and must not be based upon the personal political opinion of the adjudicating officer. Accordingly [Randall's] non-proscribed written political opinions ... must be accorded neutral evidentiary weight as they relate to the issue of discretion.

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alien" category other than subsection 1182(a)(28)(G)(v). Cf. supra note 5.

He then stated that in view of the United States citizenship of Randall's parents and children, her ownership of a home in the United States, and the significant value of her service to the academic community, "the favorable exercise of discretion would be warranted in [her] case were she eligible to receive an immigrant visa and admissible to the United States for permanent residence." Randall promptly appealed the immigration judge's decision that she was statutorily ineligible to receive a visa to the Board of Immigration Appeals; the Board heard oral argument on October 20, 1987, and the matter remains sub judice there.

C. Proceeding in the District Court

On October 28, 1985, two days before expiration of the time the district director had allowed for Randall's voluntary departure, and ten days before

the Immigration Service ordered Randall to show cause why she should not be deported, Randall commenced the instant action challenging the district director's October 2, 1985 denial of her status adjustment application.[9] Randall asserted that the district director acted without statutory authority, and in violation of her first and fifth amendment rights, in rejecting her adjustment application, as a matter of "discretion," because of the ideas and opinions she had expressed. She sought declaratory and injunctive relief, including "[a] declaration that 8 U.S.C. §§1182(a)(28)(G) and (C) are unconstitutional," and an instruction to the district director to grant her

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[9]Several prominent authors, a world association of writers, two academic colleagues, and a student enrolled in Margaret Randall's courses joined Randall as named plaintiffs.

application, or to reconsider it within appropriate constitutional and statutory limits.

The district judge, confronting Randall's motion for immediate injunctive relief and an opposing motion by defendants to dismiss the case, and aware of the ongoing deportation proceedings, made no definitive ruling until the immigration judge had completed his consideration of Randall's status adjustment plea. Eventually, in an opinion and order filed June 5, 1987, the district judge granted the defendants' motion to dismiss the case, making it plain that he did so exclusively on "the unique facts" presented. Randall v. Meese, No. 85-3415 (D.D.C. June 5, 1987).

The district court's opinion reflects

the intricacy of the law in point[10] and makes these principal observations: alleged abuses by a district director ancillary or preliminary to deportation proceedings may be reviewable in district court; the Supreme Court, in Kleindienst v. Mandel, 408 U.S. 753 (1972), upheld the constitutionality of exclusions under 8 U.S.C. §1182(a)(28) based on an individual's political beliefs; Congress, as the immigration judge had indicated, probably did not intend that discretionary rulings could rest solely on an individual's non-proscribed political opinions; deportation proceedings afford the alien an opportunity for de novo,

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[10]Cf. Sang Seup Shin v. Immigration and Naturalization Service, 750 F.2d 122, 125 n.5 (D.C. Cir. 1984) (expressing court's "discomfort with the nation's convoluted immigration laws and their uncertain, inefficient, or protracted administration").

plenary consideration of her application for adjustment of status; the deportation process now in motion secures for Randall the fair consideration she warrants; no credit is due the district director's ruling in those proceedings; although the district director's denial of Randall's application is not itself subject to administrative review, the director's decision, to the extent it entailed an excerise of "discretion," has been effectively overtaken by the immigration judge's decision in the ongoing deportation proceeding.

The district judge did not label his dismissal order. Randall describes it as a mootness ruling and assails it on that basis. For the reasons we next state, we comprehend the dismissal order differently. The district judge has left Randall's

substantive pleas untouched, it is true, but still open for judicial review at a later time--when a final order has been made by the Board of Immigration Appeal--and in another place--in the judicial circuit in which the El Paso district director and immigration judge proceeded, or the judicial circuit in which Randall reside. See 8 U.S.C. §1105a(a)(2) (restricting venue choice for review of final orders in deportation proceedings, quoted supra p.7). So comprehended, the district court's ruling means that Randall has asked for judicial intervention not too late but too soon, i.e., that her Complaint's essential prayers for relief--declarations that defendants (Attorney General, Commissioner of the INS, District Director) have arbitrarily refused to adjust her status and that 8 U.S.C.

§1182(a)(28)(G) and (C) are unconstitutional--demand answers to questions not ripe for court review on the basis of the district director's inconclusive disposition.[11]

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[11]The Prayer for Relief presented in Randall's Complaint, in its entirety, invites:

> a) A declaration that defendants' refusal to grant Randall's adjustment of status violates the First and Fifth Amendments, and is arbitrary and capricious, an abuse of discretion, and contrary to law, in violation of 5 U.S.C. §706;
>
> b) A declaration that 8 U.S.C. §§1182(a)(28)(G) and (C) are unconstitutional;
>
> c) An injunction directing defendants to reconsider Margaret Randall's application for adjustment of status to permanent resident alien, and

IV. ANALYSIS

Randall's insistence that judicial review is in order here, i.e., in the District of Columbia federal courts rather than in the judicial circuit where

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> prohibiting defendants from continuing to exercise their discretion in a manner that is inconsistent with the terms and intent of the Immigration and Nationality Act and that violates the guarantees of the First and Fifth Amendments; or in the alternative, ordering defendants to grant Randall permanent resident status.
>
> d) Such other and further relief as this Court deems just and proper; and
>
> e) The costs and attorneys' fees incurred in this action.

Complaint, Randall v. Meese, D.D.C. No. 85-3415.

administrative proceedings were initiated (Fifth Circuit) or in which she resides (Tenth Circuit) (see 8 U.S.C. §1105a(a)(2), and now (in advance of termination of the deportation proceedings), depends entirely on an ingenious, but incorrect characterization of the district director's action. She maintains, with increasing certitude, that the district director first found her statutorily eligible for adjustment of status, and only then rejected her application in an abusive, unauthorized, unconstitutional exercise of discretion. Had the district director followed up the hypothesized finding that she was statutorily eligible for adjustment of status with a properly constrained exercise of discretion, Randall's argument continues, he would have granted her application, there would have been no

deportation to fight, she would be a permanent resident, perhaps even by now a citizen.[12]

Were Randall correct that the district director did indeed definitively find that "she was not excludable under either 8 U.S.C. §1182(a)(28)(C), which bars aliens who have been members of the Communist Party, or 8 U.S.C. §1182(a)(28)(G), which excludes aliens who write, publish, or circulate matter advocating or teaching the 'economic, international, and governmental doctrines of world communism'," Brief for Appellants at 9 (emphasis in original), the rest of her argument would have more force. Were her first premise right, we would still face the unsettled question whether the district director's decision is

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[12]Under 8 U.S.C. §1430(a), an alien can apply for naturalization three years after becoming a lawful resident.

amenable to direct judicial review. Compare Kashani v. Nelson, 793 F.2d 818 (7th Cir. 1986) (suggesting, in the context of an asylum application, that such review would constitute an impermissible end-run around the deportation process) with Jaa v. United States INS, 779 F.2d 5769 (2d cir. 1986) (upholding on direct review district director's denial of status adjustment). But assuming arguendo a resolution of that threshold issue in Randall's favor, the question of central concern to us would be whether the district director tolerably exercise his discretion. If we answered that question by concluding, in line with the analysis of the immigration judge, see supra pp. 11-12, that the director improperly calculated the discretionary balance, Randall's plea for a remand with instructions to grant her status adjustment

application would be legitimate.

But we cannot accept Randall's first premise. We do not agree that the district director found her statutorily eligible, we cannot pretend that he proceeded in the logical order and with the conscious design Randall attributes to him, i.e., first firmly resolving that she was not excludable under 8 U.S.C. §1182(a)(28)(G) or (C), and only then deciding that he nonetheless had power to, and should exercise his discretion against her. The Supreme Court, correcting the error of our sister court, has made this much plain: district directors denying adjustment of status need not rule on eligibility first; they may instead pretermit that issue and go at once to the matter of discretion. See Immigration and Naturalization Service v. Bagamasbad, 429 U.S. 24 (1976),

reversing 531 F.2d 111 (3d Cir.). We think it imaginative, but implausible, to contend that the director here took any route other than the easy one declared open to him by the Supreme Court, i.e., he pertermitted the subsections 1182(a)(2)(G) and (C) questions, skipping from them to the matter of his discretion.

As the district court observed, while the district director referred to the excludable alien categories of section 1182(a)(28), he based the denial of Randall's application on his discretion, and it surely is not clear, as Randall lately argues it is, that he effectively decided that Randall was statutorily eligible.[13] "Statutory eligibility," the

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[13]Randall's position on what the district director decided has lost no flesh in the retelling. Her Complaint asserted, simply and accurately, that the director "did not ... find her excludable on

district judge pointed out citing Bagamasbad, "need not be decided if an adjustment of status is denied for discretionary reasons." Randall v. Meese, No. 85-3415, slip op. at 14 n.8.

Randall's now insistent claim that the district director definitively found her to be statutorily eligible rests on a single phrase in the director's decision, cut loose from its context: "even though the applicant appears to be statutorily eligible ..., the grant of an application

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[subsection 1182(a)(28)(G) or (C)] grounds." Complaint para. 25. That assertion is entirely consistent with the view that, as the Supreme Court held proper in Bagamasbad, the director bypassed the section 1182(a)(28 inquiry. But by the time the case was aired in the district court, Randall's initial "did not find her excludable" averment became "found her admissible." See Randall v. Meese, No. 87-5230, Transcript of Proceeding, Feb. 24, 1987, at 91 ("[district director has] found her statutorily eligible"), 92 ("[district director] has already, in fact, found her to be statutorily eligible").

is a matter of discretion...." We have set out supra pp. 9-10 the relevant surrounding text of the director's decision, and in an appendix hereto, the full text of that decision. The director mentioned the statute first, the 8 U.S.C. §1255(a) specification that the Attorney General, "in his discretion" may adjust the status of an alien. He next cited INS decisions in point. He then stated that the cited decisions, "with others, point out that even though the applicant appears to be statutorily eligible," there is a discretionary determination to be made. We think the most likely reading of the director's full statement is that he intended the words "the applicant" to refer to applicants in general, not applicant Randall in particular. In any event, he certainly did not make any conclusive

pronouncement that Randall cleared the subsections 1182(a)(28)(G) and (C) hurdles, for he used the qualifying words "appears to be" in his statement. Finally, we note, it is plausible to suggest that the director had in mind not Randall's clearing of the section 1182(a)(28) excludable alien hurdles, but her satisfaction of the requirment that a visa be available to her based on the petition of a close relative-her citizen son. See supra p.8.[14]

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[14]In her brief, Randall attempted to cordon off from our view the immigration judge's finding that she was statutorily ineligible for adjustment by observing that "defendants [themselves] concede that the district director has already found Ms. Randall statutorily eligible for adjustment of status." Brief for Appellants at 21 (emphasis in original). But defendants made no such concession. True, the Assistant U.S. Attorney did say to the district court, "she was determined to be eligible...." But the Assistant's full statement was: "she was determined to be eligible, because she married an American citizen." Transcript of Proceeding, Feb. 24, 1987, at 70. This statement plainly

In sum, Randall's plea--for an instruction from the district judge simply ordering the district director to grant her application or to do over only "the discretionary component of [his] adjustment decision," Brief for Appellants at 21--is inadmissible.[15] However infected that

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referred to the third, not the second, §1255(a) specification-the availability of a visa based on the petition of a U.S. citizen close relative. See supra note 4. As the immigration judge recounted, both Randall's U.S. citizen spouse, and her U.S.-citizen son petitioned for an immediate relative visa on Randall's behalf. That judge considered the son's petition the necessary and sufficient one, in view of "certain marital difficulties." Decision of the Immigration Judge, In re Margaret Jo Randall, A 11 644 708 slip op. at 11 (Aug. 28, 1986).

[15]There is an irony in Randall's plea that absent court intervention now, the district director's decision will escape judicial correction, for the review she invites is one-sided. Were we to direct a remand of the limited scope she urges, we would cut off the opportunity for the INS to maintain and argue in court that section 1182(a)(28) applied to Randall (until 1988, when section 901 of the Foreign Relations

exercise of discretion was, the district director, were he to be restored nunc pro tunc to a decisionmaking position, could not adjust Randall's status without answering the question he did not decide definitively, if at all: as of October 2, 1985, the date he denied Randall application, was she statutorily eligible to receive an immigrant visa as an alien "admissible to the United States for permanent residence." 8 U.S.C. §1225(a)(2). See supra pp. 9-10.

A remand to the district director at this stage, we further note, would be out of sync with the prescription that "[a]fter

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Authorization Act became effective, see supra note 2 and accompanying text) and is constitutional as so applied. Individuals are entitled to a fair opportunity to be heard before adverse action is taken against them. But government too should have a fair chance to assert and defend in court the propriety of the executive's application of a legislative measure.

an alien has been served with an order to show cause ..., his application for adjustment of status ... shall be considered only in [the deportation] proceedings." 8 C.F.R. §245.2(a)(1). There is further the complication that the immigration judge's decision now extant concludes that Randall fits the subsection 1182(a)(28)(G)(v) excludable alien category, so that at the time of his disposition, she was not statutorily eligible for adjustment.

Moreover, in the ongoing deportation proceedings, the recent change in the law governs. Under the Foreign Relations Authorization Act, Pub. L. No. 100-204, §901, 101 Stat. 1399-1400, see supra pp. 3-4, in contradiction of subsection 1182(a)(28)(G)(v), no alien may be denied a visa or excluded from admission "because of

any ... beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States." But this recent change in the law does not reach back to October 2, 1985, the date of the district director's decision, i.e., the date from which Randall wants her adjustment to run. See 8 C.F.R. §245.2(a)(5)(ii) (adjustment effective as of date of order approving the application). The section 901 change, by its express terms, applies only to applications for visas submitted during 1988, admissions sought after December 31, 1987 and before March 1, 1989, deportations based on conduct occurring in 1988, and deportations pending during 1988. Because Randall's 1984 application to the district director falls short of these time lines,

the director, it seems, would still have section 1182(a)(28) as the legal frame Congress set for his decision. This state of things has confusion-breeding, conflict-generating potential, and renders a return to the district director hardly auspicious for Randall. We note here as well the statutory provision for rescission of a status adjustment if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status." 8 U.S.C. §1256(a).

Our account of the adjustment of status regime, see supra pp. 4-7, and of the reasons why the district director currently is not well positioned to rehear Randall's 1984 application, see supra pp. 16-21, go a long way to explain our conclusion: judicial review of the

questions whether and as of what date Randall's status should be adjusted is not yet in order. The strand of the ripeness doctrine we apply in this case is "very much a matter of practical common sense." Continental Air Lines v. Civil Aeronautics Bd., 522 F.2d 107, 124 (D.C. Cir. 1974) (en banc) (McGowan, J.); cf. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

Judicial appraisal of Randall's case is "likely to stand on a much surer footing" when the deportation proceedings have concluded, and in the interim, Randall faces "no irremediable adverse consequences." See Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967). Those administrative proceedings, as the decision of the immigration judge already indicates, "may sharpen the controversy or remove the

need for decision of at least some aspects of the matter." See L. Tribe, American Constitutional Law, 78 (2d ed. 1988). Once the Board of Immigration Appeals has rendered its decision, Randall may proceed to the appropriate circuit court--in her situation, the Fifth or the Tenth Circuit, see U.S.C. §1105a(a)(2)--"by the normal appeal route." See Hotel and Restaurant Employees Union, Local 25 v. Smith, 846 F.2d 1499, 1501 (D.C. Cir. 1988) (separate opinion filed by Mikva, J.).

It will be open to Randall to argue, if she takes "the normal appeal route," not only that she qualifies for permanent resident status now, i.e., in 1988 by virtue of section 901 of the Foreign Relations Authorization Act, but that the court should order retroactive adjustment because (i) properly construed, subsection

1182(a)(28)(G)(v) never rendered her ineligible for a visa, or (ii) if section 1182(a)(28) did exclude her, as the immigration judge held it did, then the measure, as applied to her, must be regarded as null from the start because incompatible with the Constitution. We express no view on the merit of such argument.

In short, we do not find this controversy moot. Our disposition, affirming the district court's, defers, it does not deny, Randall's right to obtain judicial review of subsection 1182(a)(28)(G)(v), a principal objective of her Complaint, and retroactive relief if her statutory construction or constitutional arguments prove persuasive. By ruling that she must take "the normal appeal route," we assure that eventual

court review will be enlightened by a full record, including the Board of Immigration Appeals' decision, and that this court avoids premature blockage of, or interference with, regulatory actions Congress has assigned to other government bodies. We note in this regard that the district director's role in this matter has been assigned to him by the Attorney General's delegation, and to by the legislature's direction. We also note the fact, acknowledged by appellees, that Randall can assert the invalidity of the deportation proceedings in those proceedings themselves, and on circuit court review therefrom. Brief for Appellees at 25-26. And we recall Randall's own assertion that a court armed with equitable remedial authority can grant retroactive relief where necessary to "do

complete rather than truncated justice." Appellants' Reply Brief at 16 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).[16]

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[16]The dissent would reverse the decision of our district court and remand the case forthwith to the district director with directions that he not exercise his discretionary powers in an unconstitutional manner. This solution encounters several obstacles.

First, the reviewability of district director status adjustment decisions is unsettled. See supra p. 16. The Supreme Court has indeed affirmed that when a district director denies a state of deportation, judicial review is available and ordinarily lies initially in district court rather than in a court of appeals. See Chen Fan Kwok v. INS, 392 U.S. 206, 210 (1968) (review in court was conceded; case raised "narrow question" whether the district court was a proper first forum for that review), quoted in the dissent at 5. But the Supreme Court has not yet grappled with the question whether, outside the context of a deportation proceeding or order, district director status adjustment or asylum application denials are amenable to court review. To treat the question cogently, one must face a historical obstacle. To this day, "decisions of United States consuls on visa matters are nonreviewable by the courts." Centeno v.

Shultz, 817 F.2d 1212, 1214 (5th Cir. 1987), cert. denied, 56 U.S.L.W. 3459 (U.S. Jan. 9, 1988). A district director's status adjustment decision, it has been observed, "simply provides a replacement for traveling overseas to obtain an immigrant visa in the classic fashion, from a consular officer." T. Aleinikoff & D. Martin, supra p. 5, at 288.

Second, we disagree with the dissent on what the district director meant to convey and have therefore set out the director's decision in full in an appendix. Would the dissent allow room for the district director to say the dissent read him wrong? Is the director's decision as "subjective and unguided" as the dissent says it is, see dissent at 2, given the tenor of the statute the director had in full view, 8 U.S.C. §1182(a)(28)(1982), an enactment that rendered excludable aliens who published writings advocating doctrines of world communism? See supra pp. 8-11. Under the general rule that as between successive judgments in separate proceedings the second in time prevails, see Restatement (Second) of Judgments §15 (1982), has the decision of the immigration judge overtaken the decision of the district director to the extent that the two decisions conflict?

In sum, does the dissent, so quick to rule against Randall on questions we leave open for her to raise in the proper court, reach its own finishing line by end-running

CONCLUSION

For the reasons stated, we disallow Randall attempt to turn a preliminary, abbreviated administrative procedure intended as a convenience for the alien into a fulcrum to leverage judicial review while the matter still awaits the final agency ruling, made on a full record. Accordingly, the judgment of the district court dismissing the Complaint is affirmed. We reiterate that the dismissal is without prejudice to Randall's renewal of her claims at the conclusion of the administrative deportation process, and by the normal appeal route.

It is so ordered.

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all the hurdles?

APPENDIX*

DECISION ON APPLICATION FOR STATUS AS PERMANENT RESIDENT

Section 245 of the Immigration and Nationality Act, as amended, provides that "The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence..." (Emphasis Supplied).

The record reflects that the applicant was born on December 6, 1936, in New York, New York, and that she renounced her United States Citizenship at the American Embassy in Mexico City on July 13, 1967. This act of expatriation was confirmed by the United States Department of State on July 30,

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*This appendix reproduces the District Director's decision without alteration or correction.

1969, when the applicant was informed that she was ineligible for restoration to United States Citizenship. She is presently a citizen of Mexico.

The applicant last entered the United States at Miami, Florida on January 18, 1984, with a B-2 visitor's visa obtained on August 31, 1983, at Managua, Nicaragua. The Mexican passport of the applicant shows that this was her third entry into the United States using this visa.

The instant application was filed on March 14, 1984, and seeks permanent resident status based on an immediate relative visa petition which was filed on the same date by her United States Citizen husband, whom she married shortly after her last entry into the United States. The visa petition was approved on June 7, 1984.

During an interview on June 7, 1984

with the applicant, her husband and their attorney, the applicant was questioned concerning the facts surrounding the relinquishment of her United States Citizenship in 1967. Her response was that the action was taken primarily for economic reasons. She also indicated that she had been involved in certain activities that she is now regretting. Because the adjudicating officer was not satisfied that the applicant was not excludable under one or more provisions of section 212 of the Act, supra, an investigation was requested.

The investigation revealed that the applicant is a poet and a writer who has had several of her books published. On October 11, 1984, an investigator of this Service placed the applicant under oath and took a statement regarding her past activities subsequent to her expatriation

and while she was living in Mexico, Cuba, and Nicaragua. It was determined that the applicant lived in Mexico from the time of her expatriation in 1966 to 1968, when anti-government activities during the student revolution forced her to flee Cuba. In 1961 she moved to Nicaragua.

Five of the applicant's books have been examined for the purpose of determining whether the applicant would be excludable under the provisions of 212(a)(28) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(28) which states in pertinent part (G) "Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the

purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either or specific individuals or officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawul[sic] damage, injury or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a

totalitarian dictatorship;...".

In "Part of the Solution, Portrait of a Revolutionary", written by the applicant and published by New Directions Publishing Corporation in 1973, which is available from the public library under the biography section, Mr. Robert Cohen, a close associate who lived with the applicant for approximately 8 years in Mexico and Cuba provides this insight to the applicant. "Margaret (meaning the applicant, Margaret Randall) has been keeping a diary for over a year and a half, since July '69 when we were forced into hiding in Mexico. The diary contains some of her best writing. And most useful". "This contrasts completely with the diary she kept as a kid, which is really one of the "pure products" of the Amerika (sic) Margaret has now dedicated her life to destroying".

Mr. Cohen continues in his introduction to expound on Ms. Randall's political activities and ideologies and further explains the purpose of the magazine that she, along with her ex-husband published in Mexico. "El Corno Emplumado" (The Plumed Horn) is described as a publication that early in its history was devoted to a mini-anthology of Cuban revolutionary poetry. It appears that because of the publication, Ms. Randall began to meet many revolutionaries. In a trip to Cuba to attend the Cultural Congress of Havana in 1968 she was given a ring which was made from the downed American Planes by the Vice-Minister of Culture of the Democratic Republic of Vietnam, Huy Can. Mr. Cohen states how the giving of this ring beautifully expresses solidarity with the American people and

optimism about the outcome of our common struggle (emphasis supplied). After she returned from Cuba and the Cultural Congress, Ms. Randall together with Mr. Cohen, "... did the last couple of issues of El Corno together, changing the nature of the magazine, trying to make it a revolutionary weapon". Mr. Cohen met Ms. Randall in February 1968, and his total introduction into Ms. Randall's past comprises some 46 pages of her book.

The book has "Notes" from Ms. Randall's Diary 1970-71 in which she states the following on the dates indicated. "April 20-26 (The cane fields)."

"... Monday night we all listened to Fidel's speech at the funeral of the five men who lost their lives defending the nation against the recent mercenary attack near Baracoa. Five of our men". (emphasis

supplied). "The attack only one of a more or less constant series over these past eleven years, but a big one. Stray mercenaries still being rounded up. Modern American weaponry". "We get the Voice of America Station clearly out here, and a local Miami station as well: the lies are fantistic ..." "Fidel was right-on as always. We felt the passion, and it released, to some extent, the anger in us all".

May 17-20:

"... All eyes and much of the world's anger were focused on the latest U.S. aggression: Cambodia". "... culminating in the assassination of the six blacks in Jackson and Atlanta and the four white middle-class students in Kent, Ohio".

"... The news broke Tuesday morning, and by dawn Friday spontaneous crowds had

begun to gather before the Old American embassy building on the Havana seaside drive". "... It was natural that the offensive building should draw the people's protest...".

"A day like any other today. To work early-around seven-then to see Robert at the hospital, ..., (Robert Cohen) to a meeting with a representative of the party at the Book Institute concerning an aspect of the book about women".[1] (Emphasis Supplied).

"... They tried to reach me at work. All the speakers at Sunday night's rally (where I spoke for North American revolutionaries) were invited to go out to the airport with the fishermen's families..."

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[1] Cuban Women Now, Margaret Randall, 1974 Published by The Women's Press, Printed by Hunter Rose in Toronto, Canada.

July 10:

"... Two experiences yesterday brought me closer to the Cubans in their Revolution in a way I hadn't experienced before": "... Representatives from the party and the Communist Youth showed us around, talking with the workers ..."

"The second experience took place after dinner when we went to a session of the people's court ..."

November 22:

"I'm every day confronted by the different growth the children experience here, in short: how communist they're becoming!" (In particular, Ms. Randall's child Gregory).

May 6:

"... even a congress of the Cuban Communist party (so long awaited, and the absence of which has been so absurdly

criticized by some). The cultural policy has been defined, and a whole process is being unleased, and it all fits together". "It's a very beautiful and exciting thing to watch, and even more beautiful to participate in..." (emphasis supplied).

July 26:

"... In a long (eight to seven) workers' assembly yesterday, we discussed all the comrades' merits and demerits, and proposed, discussed, and voted from among our ranks for the growth of the "Vanguard Workers Movement". It was the most profound and combative assembly we've had: people learning to really search each other out, in the healthiest ways. I was moved and happy to be elected Vanguard Worker. Of the twenty-one workers in our collective, nine of us were elected..."

(emphasis supplied.[2]

July 26:

"Fidel's July 26th speech just ended; ... tremendous effort and especially a new and more vigorous organization has raised production from ten percent ... to over fifty percent in certain areas! I felt that increase as my own, as our own ..."

Mr. Randall in this book refers to the Attica State Prison Riots in Attica, New York with her poem "I am Attica". In this poem she makes reference to the prisoners as brothers and the law enforcement officials as "Pigs". In one stanza of the poem she writes. "Maximum security

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[2]ibid: page 367, "A MILITANT-is a member of a selective political organization. In Cuba these are the young Communists and the Cuban Communist Party Members. ... Militants form the vanguard within the revolutionary process: they hold the total respect and confidence of their comrades". (emphasis supplied).

amerikkka leading their minimum security sisters and brothers black, brown, and white together in one fierce cry of REVOLUTION ... REVOLUTION NOW!". She makes reference to the badge of the law enforcement officials as "coward's shield", and the lies the law enforcement authorities make against "our truth". She writes, "monster Amerikka in the pit of her blackest cesspool gut..."

September 13, 1971. "42 dead; 32 Rebels and 10 hostage guards, all killed by the coward power of The Man:..."

In 1975, Spirit of the People, was written by the applicant and published by New Star Books 2504 New York Ave. Vancouver 9, B.C. In the introduction to this book Ms. Randall describes the United States as the "... most powerful enemy humankind has known, (sic) ..." "The Vietnamese victory

of January 27, 1973, was decisive for us all ..." She states that on September-October 1974, she was privileged to be invited by the Women's Union[3] to visit the DRV.

She refers to the, "U.S. War Criminals," and the evacuation of Vietnamese children as "... this latest U.S. crime; the kidnapping of Vietnamese Children, forcing them to the land of their murderers, robbing them of their homeland, their parents, their culture".

"The war is over and the Vietnamese Revolution has won its greatest victory. U.S. imperialism has suffered it's greatest defeat, a strategic turning-point in its decline". The above written in Havana in June 1975.

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[3]Vietnam Women's Union, founded in 1930 along with the Vietnam Workers Party (Communist).

This book has numerous references to her comrades of North Vietnam and describes the "... constant enemy in the sky (the Phantoms and the B-52's)."

The national concern over subversive aliens entering this country has continuously expanded the measures barring their entry to the United States. Dating from 1903, Congress has seen fit to enact legislation barring entry to those aliens whose presence is deemed detrimental to the national interest of the United States. Until 1940 the statute reached only those who presently advocated or who presently were members or affiliates of organizations which advocated violent overthrow of the United States Government. The Alien Registration Act of 1940 expounded this exclusion provision by adding aliens who at any time had advocated or belonged to

organizations advocating the prohibited doctrines. In 1950 the Internal Security Act specifically named the Communist Party and banned aliens who at any time had been members of that organization or its sections or affiliates. (Sec. 22, Internal Security Act of 1950, 64 Stat. 987).

In Gordon and Rosenfields's Immigration Law and procedure, it is noted that "The precise ambit of the statutory reference to affiliation is not easy to define". "In Kettunen v. Reimer, 79 F.2d 315 (2d Cir. 1935), the court found that affiliation connoted

> "A status of mutual recognition that he may be relied on to cooperate with the Communist Party on a fairly permanent basis ... affiliation includes an element of dependability upon the which the organization can rely ..."

This expression was cited with apparent approval in Bridge v. Wixon, 326

U.S. 135, 143, 65 S. Ct. 1443, 89 L.Ed 2103 (1945), where the court found that affiliation imports

> "less than membership but more than sympathy ... But he who cooperation with such an organization only in its wholly lawful activities cannot by that fact be said as a matter of law to be "affiliated" with it... Whether intermittent or repeated, the act or acts tending to prove "affiliation" must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition".

In Matter of G., 5 I&N Dec. 112, it was held that an alien who, althougn not a member of the Communist Party, was a sympathizer with its principles, who subscribed to and sold the Daily Worker, distributed Communist literature and made speeches in behalf of The Party is deemed

to have been affiliated with the Communist Party. The membership rolls of the Communist Party are not open to public scrutiny and the applicant has denied that she was a member of the Communist Party.

By her own admission, the applicant has made speeches for The Communist Party. Her books advocate the doctrines of communism and support the communist government of Cuba, Vietnam and Nicaragua from 1966 to 1981. There are constant references to the United States as "the enemy" in her books. A close associate, with whom she lived for approximately eight years, refers to "... the Amerika that Margaret has now dedicated her life to destroying". The extent of the applicant's support and sympathy for the communist governments of Cuba, Vietnam and Nicaragua, and her activities while residing in those

countries, can only be determined from her own statements and those of her close friends and associates.

Benefits under section 245 of the Act, supra, are discretionary. There are numerous decisions relating to the discretionary authority of the Attorney General in the adjudication of applications for adjustment of status. See Matter of Marques, 16 I&N Dec. 314, (BIA 08-17-77); Matter of Ibrahim, 18 I&N Dec. 55 (BIA 05-18-81); Matter of Leung, 16 I&N Dec. 12 (D.D. 09-18-76); Matter of Ortiz-Prieto, 11 I&N Dec. 317, (BIA 07-16-65). All of these decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under Section 245 of the Act, the grant of an application is a matter of discretion and administrative grace. Furthermore, the

applicant has the burden to show that discretion should be exercised in her behalf. See also Matter of Arai, 13 I&N Dec. 494 (BIA March 4, 1970).

The record of the applicant is self-evident. She has failed to show that she is clearly and beyond a reasonable doubt entitled to the benefits for which she has applied. Her activities and writings for nearly the past 20 years speak for themselves. Her writings go far beyond mere dissent, disagreement with, or criticism of the United States or its policies. Her associations with, and her activities and writings in support of the communist dominated government of Cuba, North Vietnam, and Nicaragua; and her advocacy and support of revolutionary activity in Mexico as well as her affiliation with and participation in

Communist Party activities, warrant the denial of her application for adjustment of status as a matter of discretion.

For the forgoing reasons, favorable exercise discretion is not warranted in this case.

Your pending application for adjustment of status is hereby DENIED.

MIKVA, Circuit Judge, dissenting: Appellant Randall would, I am convinced, have obtained the status adjustment she seeks but for a government official's unconstitutional action. The record indicates that the district director ruled that she was statutorily eligible for a status adjustment, but decided that he would not grant it because he disapproved of her writings and associations. The majority holds that Randall's claim is not ripe and that she must pursue her claim at a later time in other courts. But it minimizes the crucial importance of the citizenship right at stake. As the Supreme Court has noted, "[a] person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process which led to his status merely on the basis of speculation over the

availability of other forms of relief." INS v. Chadha, 462 U.S. 919, 937 (1983). I think appellant's claim is ripe now. Moreover, I am not at all convinced that the appeals route outlined by the majority will enable Randall ever to get full relief for her injury. For these reasons, I respectfully dissent from today's decision.

I.

The unconstitutional action at issue in this case was the district director's decision to use his discretion to deny Randall's status adjustment because of his dislike for her writings and associations. That the district director based his denial of discretion on these factors is set forth clearly in his decision. He stated that Randall's "writings go far beyond mere dissent, disagreement with, or criticism of the United States or its policies."

Appendix at 34. He concluded that those writings, "as well as her affiliation with and participation in Communist Party activities, warrant the denial of her application for adjustment of status as a matter of discretion." Id.

Allowing a discretionary decision of whether to grant a status adjustment to turn on a government official's subjective and unguided reaction to an individual's writings violates the requirement that delegations in the first amendment area provide "narrowly drawn, reasonable and definite standards for the [decisionmakers] to follow." Niemotko v. Maryland, 340 U.S. 268, 271 (1951); see also Cox v. Louisiana, 379 U.S. 536, 557 (1965); L. Tribe, American Constitutional Law 1056 (2d ed. 1988) ("[T]he general rule [is] that, while legislature 'ordinarily may delegate power

under broad standards ..., [the] area of permissible indefiniteness narrows ... when the regulation ... potentially affects fundamental rights,' like those protected by the first amendment.") (citing United States v. Robel, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring)).

It strikes me as clear from the district director's decision that, but for this unconstitutional determination, he would have granted Randall's status adjustment. He states in the decision, before rejecting the adjustment on discretionary grounds, that "the applicant appears to be statutorily eligible." The majority expends considerable energy in attempting to show that the district director did not really mean by this statement that Randall is statutorily eligible. I do not understand why he did

not mean what he said.

First, the majority attempts to use the Bagamasbad case for the proposition that because the district director could have exercised discretion before he ruled on statutory eligibility, it is "imaginative, but implausible" to suggest that he ruled on statutory eligibility first. Maj. Op. at 19. The Bagamasbad case reviewed a situation in which it was conceded by all sides that the district director did not make a determination about statutory eligibility. See Bagamasbad v. INS, 531 F.2d 111, 113 (3d Cir.), rev'd, 429 U.S. 24 (1976). The Supreme Court merely held that the district director was not required to make a determination of statutory eligibility. In the case at bar, the district director did make a determination that Randall was statutorily

eligible before exercising his discretion. The fact that he was not required to do so does not negate this fact.

Second, the majority asserts that "the most likely reading of the director's full statement is that he intended the words 'the applicant' to refer to applicants in general, not applicant Randall in particular." Maj. Op. at 18. The full text of the district director's decision, however, refutes such a reading. The reference to "the applicant" at issue here is sandwiched between uses of those same words that indisputably refer to Randall. A longer quotation will illustrate:

> By her own admission, the applicant has made speeches for the Communist Party. Her books advocate the doctrines of communism and support the Communist government of Cuba, Vietnam and Nicaragua from 1966 to 1981. There are constant references to the United States as "the enemy" in her books. A

close associate, with whom she lived for approximately eight years, refers to "... the Amerika that Margaret has now dedicated her life to destroying". The extent of the applicant's support and sympathy for Communist government of Cuba, Vietnam and Nicaragua, and her activities while residing in these countries, can only be determined from her own statements and those of her close friends and associates.

Benefits under section 245 of the Act, supra, are discretionary. There are numerous decisions relating to the discretionary authority of the Attorney General in the adjudication of applications for adjustment of status. [Cases omitted]. All of these decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under Section 245 of the Act, the grant of an application is a matter of discretion and administrative grace. Furthermore, the applicant has the burden to show that discretion should be exercised in her behalf. [Case omitted].

The record of the applicant is self-evident. She has failed to show that she is clearly and beyond a reasonable doubt

> entitled to the benefits for which she has applied. Her activities and writings for nearly the past 20 years speak for themselves.

Appendix at 33-34 (emphasis added). It is clear that the phrase "the applicant" applies to Randall. Yet the majority maintains that the phrase has a generic quality. This reading is not credible if the opinion is read without the active second-guessing in which the majority engages.

Finally, the majority contends that even if the statement did refer to Randall, it is not a "conclusive pronouncement" because of the use of the words "appears to be" in the statement "appears to be statutorily eligible for the benefits under Section 245 of the Act." But the phrase "appears to be" is a standard English way of expressing what one believes to be true.

Cf. Webster's Third New International Dictionary 103 (1981) (to "be obvious or evident" as a definition of "appear"). This is a particularly common usage among government decision-makers: when a bureaucrat pronounces that "your papers appear to be in order," he is indeed making a "conclusive pronouncement." Moreover, even if the use of the phrase "appears to be statutorily eligible" is not an ideal way to say that Randall is statutorily eligible, it is clearly a far worse way of stating that the district director is withholding a determination about whether Randall is eligible, as the majority would have it.

When these ultimately unconvincing arguments are cast aside, we are left with the district director's own words: "the applicant appears to be statutorily

eligible...." Absent any compelling reason to believe that he did not meant what he wrote, I think that we can only conclude that he found Randall to be statutorily eligible for a status adjustment. That being the case, Randall was denied her status adjustment due entirely to the unconstitutional action of the district director.

II.

The majority states with considerable candor that if the district director had found Randall statutorily eligible, "the rest of her argument would have more force. Maj. Op. at 16. With that much of the majority opinion I do agree. Randall has suffered real injury as a result of the district director's actions. The administrative appeals that are pending have no prospect of giving her full relief.

I am skeptical that the court of appeals that would ultimately hear the claim will be able to do so either, and in any case do not believe that Randall should have follow that route to vindicate her rights. It is clear that Randall "has demonstrated 'injury in fact and a likelihood that the judicial relief requested will prevent or redress the claimed injury.'" Chadha, 462 U.S. at 936 (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 79 (1978)). I see no reason to refrain from resolving her claim immediately.

The majority asserts that Randall's cases is now on something it calls "the normal appeal route." But the administrative appeal that Randall is now pursuing is entirely separate from and has no bearing on the district director's decision. See 8 C.F.R. §245.2(a)(5)(ii)

(1987) ("No [administrative] appeal lies from the denial of an application [for an adjustment of status] by the district director."). To the contrary, the Supreme Court has held that appeals from a decision of a district director "ordinarily lie first in an action brought in an appropriate district court." Cheng Fan Kwok v. INS, 392 U.S. 206, 210 (1968); see also Jaa v. INS, 779 F.2d 569, 571 (9th Cir. 1986) (district court has jurisdiction "to review a denial of status adjustment"). Such an appeal was properly taken in the instant case, and Randall had every reason to expect that we would review the decision of the district court. As the court below correctly noted, the mere fact that deportation proceedings have been commenced is not reason for us to decline to review an erroneous ruling of the district court.

Randall v. Meese, No. 85-3415, slip op. at 9 (D.D.C. June 5, 1987) ("[T]he Court cannot adopt defendants' myopic viewpoint concerning a district court's jurisdiction to review abuses by a district director; whether the request [for status adjustment] is considered anew in the deportation proceedings should not ipso facto shield the district director's actions."). The mere fact that the district director's unconstitutional decision was one that put appellant's claim on a new administrative track with appellate procedures of its own should not deprive her of the opportunity to challenge it directly.

Randall has been injured by the district director's decision in a manner that cannot be fully remedied by the appeals path toward which the majority has directed her. An applicant for citizenship

must satisfy a three-year residency requirement for naturalization. See 8 U.S.C. §1430(a). The loss of time toward residence requirements has been recognized as a real injury. See Chadha v. INS, 634 F.2d 408, 417 n.6 (9th Cir. 1980) ("By this difference in dates when permanent resident status is granted, Chadha ... retains a personal interest in the disposition of this petition ..."), aff'd, INS v. Chadha, 462 U.S. 919 (1983); see also INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1210 n.3 (1987). Randall has suffered such a loss in the instant case.

It is undisputed that the administrative body before which Randall's appeal is now pending cannot accord her full relief for this injury. If the district director had not exercised his discretion in an unconstitutional manner,

he would have found Randall eligible on or about October 2, 1985. She would then have been eligible for citizenship three years from that date. To make her whole--to make her a citizen at the same time she would have been had the district director acted properly--Randall would require retroactive relief. The BIA, however, has held that it does not have the power to grant retroactive relief. See Matter of Talanoa, 13 I & N Dec. 161 (BIA 1969), aff'd, 427 F.2d 1143 (9th Cir. 1970); Matter of Palmieri, 10 I & N Dec. 187 (BIA 1963); see also Dong Sik Kwon v. INS, 646 F.2d 909, 917 (5th Cir. 1981) ("Although discretion is given to the attorney General to admit applicants, he has no authority to act retroactively on an application.").

The majority does not mention this fact and states simply that when this

decision is eventually appealed to a court of appeals "[i]t will be open to Randall to argue" that her relief should be retroactive to that point, although it "express[es] no view on the merit of such argument." Maj. Op. at 22. I doubt that a court of appeals reviewing the BIA's decision could decide to grant retroactive relief. Moreover, I am skeptical that Randall's case will even be heard by a body capable of giving full relief in time to grant her such relief. Had the district director granted Randall's adjustment of status initially, her three-year residence period would conclude on or about October 2, 1988. She would be eligible to become a citizen at that time. Considering that the BIA has not yet ruled, and that even when it does it cannot grant retroactive relief, it is unlikely in the extreme that a court

capable of granting retroactive relief will even rule on the case before the date on which Randall would have become a citizen. I strongly differ with the majority's assertion that "Randall faces 'no irremediable adverse consequences.'" Maj. Op. at 21 (citation omitted).

The majority rightly points out that ripeness doctrine is "very much a mater of practical common sense." Continental Air Lines, Inc. v. Civil Aeronautics Bd., 522 F.2d 107, 124 (D.C. Cir. 1974) (en banc). I see no common-sense reason for this court to refrain from deciding Randall's claim at this time. She has been deprived of a status adjustment for an unconstitutional reason by a decisionmaker from whom there is no administrative appeal. Appeal from that decision is properly to the district court and then to this court. Her case is

now in the hands of an administrative body that, because it has held that it cannot order retroactive relief, cannot grant her full relief for her injury. In light of that inability, I find it particularly noteworthy that the majority, in rejecting Randall's claims, nevertheless holds itself out as her champion. See Maj. Op. at 24 n.16 (stating that the dissent is "so quick to rule against Randall on all the questions we leave open for her to raise in the proper court"). With friends like this Randall certainly does not need enemies. I believe that "practical common sense" dictates that we take the appeal now and begin to remedy Randall's injury. I would reverse the decision below and remand the case to the district director with directions that he not exercise his discretionary powers in an unconstitutional

manner.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET J. RANDALL, et al.,

Plaintiffs,

v.

C.A. No. 85-3415

EDWIN MEESE, III, et al.,

Defendants.

O P I N I O N

Plaintiffs filed a motion for preliminary injunction to enjoin the Immigration and Naturalization Service (INS) district director's decision which denied Professor Margaret Randall's application for adjustment of status. This Court issued an order denying the motion on May 13, 1987 for the reasons set forth below. Additionally, the defendants'

motion to dismiss is ripe for consideration and is addressed in this memorandum. Plaintiff Randall is joined in this action by writers and professors who claim that their constitutional rights to associate and receive information have been infringed by defendants' actions. The primary focus, however, is the INS action against plaintiff Margaret Randall and therefore a brief summary of her case history is set forth before turning to the applicable law.

I.

Plaintiff Margaret Randall, (hereinafter Randall), is a professor and writer whose work focus on women's issues in the context of third world cultures. Although born an American citizen, in 1967 Randall became a citizen of Mexico.[1] She

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[1]The issue of citizenship is not raised before this Court. For the purposes of this lawsuit, Randall accepts that she

entered the United States on a visitor's visa in 1984 and took up residence in Albuquerque, New Mexico where her family lives. Soon after her entry she married an American citizen who also resides in Albuquerque. Randall is currently employed as a professor at the University of New Mexico. In March, 1984 Randall and her husband filed applications requesting that she be granted permanent resident status. On October 2, 1985, INS District Director Giugni, a defendant in this action, denied Randall's application in the exercise of his discretion. Plaintiffs then filed this action alleging that Randall's application was denied solely because of her political views as reflected in her writings and

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lost her United States citizenship. She claims, however, that she became a Mexican citizen under economic duress. Plaintiffs' Opposition to Defendants' Motion to Dismiss at 1, n. 1.

therefore the administrative action was wrongful. Further, plaintiffs allege that such denial is part of a pattern and practice by defendants to unlawfully curtail public expresses and First Amendment rights.[2]

On November 7, 1985 INS issued an Order to Show Cause why Randall should not be deported.[3] In light of that development defendants filed a motion to dismiss asserting that because the deportation proceedings had begun pursuant to 8 U.S.C.

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[2]It should be noted that this is not a class action suit. The focus of this case is the alleged unlawful action against Randall and its effect on her colleagues. Cf. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[3]There is no dispute about the legality of the order to show cause. Randall's visitor's visa expired on July 15, 1984. The Attorney General is afforded broad discretion to commence or not commence a deportation proceeding. Johns v. Department of Justice of the United States, 653 F.2d 884, 890 (5th cir. 1981).

§1252(b), jurisdiction to review the district director's decision no longer remained in the District Court. Plaintiffs filed a motion for partial summary judgment and defendants moved to stay the response until this Court ruled on the pending motion to dismiss.

In the deportation proceedings Randall's adjustment of status was considered de novo. In a 32 page opinion, filed August 28, 1986, the immigration judge denied Randall's application. He found that she was excludable under 8 U.S.C. 1182(a)(28)(G)(v) and thereby was statutorily ineligible to receive a visa. Since this is a precondition to the adjustment of status procedure the request had to be denied. Significantly, the immigration judge concluded that if Randall were eligible to receive an immigrant visa

the favorable exercise of discretion would be warranted in her case.

On January 30, 1987 Plaintiffs filed an application for preliminary injunction and requested a consolidation of the hearing with the trial on the merits. After thorough consideration of the motion for preliminary injunction the Court denied the motion on May 13, 1987 for the reasons set forth below. Additionally, the Court concludes that the motion to dismiss should be granted. The Court's analysis of both motions is as follows.

II.

PRELIMINARY INJUNCTION

In order to be entitled to injunctive relief, the plaintiffs must demonstrate that they are likely to prevail on the merits, that without such relief they will suffer irreparable harm, that if injunctive

relief is granted other persons will not suffer substantial injury, and that the granting of such relief would not be adverse to the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 182 U.S.App.D.C. 220, 222, 559 F.2d 841, 843 (1977). Plaintiffs do not ask to maintain the status quo but instead seek to have the district director grant Randall's application for adjustment of status or, in the alternative, reconsider it within constitutional and statutory limits. Plaintiffs initially alleged injury to their constitutional rights but they have not sought preliminary injunctive relief until now.

Although all plaintiffs join in the request for injunctive relief only Randall directly asserts irreparable harm. She argues that but for the district director's

decision she would not subjected to deportation proceedings which are costly and restrict her right to travel abroad for personal or professional reasons. Further, as a result of the district director's decision Randall is reluctant to exercise her First Amendment freedoms. Finally, Randall asserts that the district director's actions debased her reputation in the community. Each asserted harm is cognizable in isolated situations but when placed within the parameters of this case they cannot support a request for preliminary relief. Further, based o the Court's determination on the motion to dismiss, plaintiffs cannot prevail on the merits.

The alleged harm from the restriction of travel is a direct consequence of the pending deportation proceeding. Although

Randall's personal and professional life may be constrained by the deportation rules, 8 U.S.C. §1105a clearly provides for exclusive jurisdiction to review deportation proceedings. Chen Fan Kwok v. INS, 392 U.S. 206, 88 S.Ct. 1970 (1968); Riva v. Attorney General of the United States, 377 F.Supp 1286, 1288 (D.D.C. 1974). Such review is not in the district court. Further, in the context of a deportation proceeding, 8 C.F.R. 245.2(a)(3)(1986) does not specifically preclude Randall from travelling abroad but instead deems such travel an abandonment of her application. That Randall is forced to submit to the burden of undergoing the administrative process, is not the sort of "irreparable harm" that would justify the injunctive relief sought. Najafi v. Civiletti, 511 F. Supp 236, 240 (W.D. Mo.

1981).

Randall also asserts harm to her First Amendment freedoms. Because the district director's actions allegedly chilled Randall's speech, the right of others to associate and exchange ideas is affected. Additionally, Randall's reputation is now stigmatized as evidence by incidents of negative community reaction. It is undisputed that such harms are cognizable. "Where the government's action inflicts a palpable injury on the individual because of his lawful beliefs, it has the direct and consequent effect of chilling his rights to freedom of belief and association." Clark v. Library of Congress, 750 F.2d 89, 94 (D.C. Cir. 1984). The loss of First Amendment freedoms, unquestionably constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373,

96 S. Ct. 2673, 2690 (1976).

The weak link in plaintiff's argument, however, is whether the relief sought will forestall irreparable injury. Generally, preliminary injunctive relief is preventative, or protective and seeks to maintain the status quo pending a final determination on the merits. Washington Metropolitan Area Transit Commission, 559 F.2d at 844. Here the district director has acted. Even if this Court were to reverse the INS decision or send the matter back to the district director any stigmatizing effect has occurred. Regrettably, no judicial mandate can force a community to abandon its prejudice. What Randall apparently seeks is to have her application for adjustment of status considered within the proper constitutional and statutory guidelines. The record

reflects that Randall was afforded this opportunity, albeit, not with the same district director.

The immigration judge who considered Randall's request de novo found that but for her statutory ineligibility a favorable exercise of discretion would be warranted.[4] He fully detailed the positive discretionary considerations in Randall's case. As part of this analysis he indirectly addressed the concerns pivotal to this lawsuit.

[A]ccording evidentiary weight to

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[4]A mandatory prerequisite for adjustment of status is that Randall is statutorily eligible to receive a visa. Once she was deemed ineligible any further consideration of the matter would normally be unnecessary. The Immigration Judge, for reason unknown, carefully detailed the factors for and against an exercise of discretionary relief. The Immigration Judge was not analyzing discretionary consideration as it applies to waiver of an excludability. 8 U.S.C. §1182 (a)(28); 22 U.S.C. §2691 (1982).

> respondent's non-proscribed political opinions would result in the political opinion of the adjudicating officer being the determinative factor. Clearly the favorable or unfavorable exercise of discretion cannot and must not be based upon the personal political opinion of the adjudicating officer. Accordingly, the respondent's non-proscribed written political opinions... must be accorded neutral evidentiary weight as they relate to the issue of discretion.

In The Matter of Margaret Jo Randall, File No. A11 644 708, at 31, 32 (August 28, 1986). Based on these events it is difficult to ascertain how sending this matter for reconsideration to the district director will cure the "chill" which Randall alleges she presently experiences. The immigration judge ruled in Randall's favor on the issue of discretion. The possibility that other immigration officials might act unlawfully is pure speculation. "Injunctions... will not

issue to prevent injuries neither extant nor presently threatened, but merely 'feared.'" Exxon Corp. v. Federal Trade Commission, 589 F.2d 582, 594 (D.C. Cir. 1978), cert. denied, 441 U.S. 943, 99 S. Ct. 2160 (1979).

The Court does not conclude that the district director's actions were inconsequential, only that plaintiffs have not made out a showing that without the relief sought, they, or specifically Randall, will be irreparably harmed. The question of irreparable harm is not a isolated test, however, but a part of a continuum used to decide preliminary injunctive relieF. The pivotal issue of jurisdiction and exhaustion of remedies control whether plaintiffs will likely succeed on the merits. These issues are addressed in the context of defendants'

pending motion to dismiss.

III.

MOTION TO DISMISS

Whether the plaintiffs, on the facts of this case, are likely to succeed on the merits turns on a consideration of the motion to dismiss. For this reason, a decision on the pending motion is appropriate. The gravamen of defendants' motion to dismiss is that this Court is without jurisdiction to review the matter and that Randall has failed to exhaust her administrative remedies. They cite to 8 U.S.C. §1105a(a) which provides that courts of appeal have the sole and exclusive jurisdiction to review all final orders of deportation pursuant to administrative proceedings under section 8 U.S.C.

§1252(b). Cheng Fan Kwok v. Immigration And Naturalization Service, 392 U.S. 206, 88 S. Ct. 1970 (1968). Defendants contend that the district director's actions are unreviewable. After a careful review of the motion and opposition thereto, the Court cannot adopt defendants' myopic viewpoint concerning a district court's jurisdiction to review abuses by a district director; whether the request is considered anew in the deportation proceedings should not ipso facto shield a district director's actions. In light of the procedural posture and the unique facts of this case, however, the plaintiffs' claims must be dismissed.

While only the court of appeals may review final orders of deportation, 8 U.S.C. §1105a, district courts have jurisdiction to review district directors'

decisions ancillary to deportation orders, even if such determinations will effectively control whether or not a given alien will be deported. Horta-Ruiz v. United States Department of Justice Immigration and Naturalization Service, 635 F. Supp. 1039, 1040 (S.D.N.Y. 1986); Tooloee v. Immigration and Naturalization Service, 722 F.2d 1434, 1437 (9th Cir. 1983). The complaint does not contest an order of deportation nor does it contest any action taken since the Order to Show Cause was issued.[5] In fact this case was

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[5]Insofar as plaintiffs allege that their right to association with Randall's ideas would be affected by her deportation they go beyond the jurisdiction of this Court. That Randall may be deported and thereby will not share ideas with citizens of this country because of her physical absence is a consequence of deportation and not reviewable by this Court. Additionally, any pattern or practice of the INS to curtail information by denying visas is also not applicable to the matters before this Court.

filed before any deportation proceedings began. The pivotal concern is the basis on which the district director denied Randall's adjustment of status application prior to a Section 1252(b) proceeding. An immigration judge and a court of appeals do not have authority to review discretionary decisions by the district director. Ghorbani v. Immigration and Naturalization Service, 686 F.2d 784, 791 n.16 (9th Cir. 1982). Defendant would have this Court preclude any review of a district director's decision, no matter how egregious, simply because deportation proceedings had commenced. Legal precedence does not mandate such limited jurisdiction. Lennon v. United States, 387 F. Supp. 561, 564 (S.D.N.Y. 1975)(district court can review district director's decision when basis for instituting

deportation proceedings was to punish alien for lawful exercise of constitutional rights.); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. 1982)(a pattern and practice to violate constitutional rights of a class of aliens constitutes wrongs which are independently cognizable in the district court.); Ghorbani v. Immigration and Naturalization Service, 686 F.2d 784, 791 (9th Cir. 1982)(review of district director's discretionary decision based on alleged nationality prejudice in refusing to reinstate nonimmigrant student status must originate in the district court.); Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. 157 (D.D.C. 1983)(challenges to alleged unconstitutional immigration procedures employed prior to the commencement of

deportation proceedings must be brought in district court.); Hassanali v. Attorney General, 599 F. Supp. 189, 193 (D.D.C. 1984)(district court has jurisdiction if matter does not result from an order entered in a deportation proceeding and fact deportation has commenced does not convert action into one brought under Section 1252.); Galvez v. Howerton, 503 F. Supp. 35, 38 (C.D. Cal. 1980)(district court has jurisdiction to review denial of adjustment of status where affirmative action of INS officials prejudiced plaintiff.) Administrative action ancillary to deportation proceedings is subject to review in the district court under the Administrative Procedure Act, 5 U.S.C. §702 and under the Immigration and Naturalization Act, 8 U.S.C. §1329. C. Gordon and H. Rosenfield, Immigration Law

and Procedure, §8.8 (1987).

Plaintiffs seek to reverse the district director's decision denying adjustment of status or in the alternative to remand the matter for reconsideration within constitutional limits. The raison d'etre of this case is to provide Randall a fair, just and unbiased determination on her request for adjustment of status. Based on the present record thus far, Randall has received the review she seeks. A brief overview of the adjustment of status procedure is helpful to understanding the Court's reasoning.

Historically, nonimmigrant aliens who sought to adjust their status were required to leave the country and seek reentry at a consular office abroad. In 1952, Congress enacted 8 U.S.C. §1255 which allowed a nonimmigrant alien the opportunity to apply

for adjustment of status without leaving the country.[6] 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure §7.7d. Jain v. Immigration and Naturalization Service, 612 F.2d 683, 686 (2d. Cir. 1979) cert. denied, 446 U.S. 937 (1980).

The adjustment of status procedure is two-tiered. At the initial stage 8 U.S.C. 1255(a) requires that, (1) the alien makes an application for adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available. An alien is statutorily eligible if these threshold requirements are satisfied. Che-Li Shen v. Immigration & Naturalization

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[6]Such proceedings did not preclude recourse to a consular abroad. The 1952 amendment simply alleviated the hardship and inconvenience for those who resided in the United States.

Service, 749 F.2d 1469, 1472 (10th Cir. 1984). The second stage involves the officer's exercise of discretion. An adjustment of status is a matter of administrative grace not a mere statutory eligibility. Ameeriar v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir.), cert. dismissed, 404 U.S. 801 (1971). Therefore, an officer may be lenient or, as one court phrased it, "cold blooded." Achacoso-Sanchez v. Immigration and Naturalization Service, 779 F.2d 1260, 1263 (7th Cir. 1985). See Sofaer, The Change of Status Adjudication; A Case Study of the Informal Agency Process, 1 J. Legal Studies 349, 374-76 (1972). This discretion, however, is not unbounded. Del Mundo v. Rosenberg, 341 F. Supp. 345, 348 (C.D. Cal. 1972). The regulations preclude a direct administrative appeal from the

district director. 8 C.F.R. §245.2(a)(4). The alien is entitled, however, to de novo review of her application for adjustment of status in the context of the deportation proceeding.

The attorney general discharges the responsibility for enforcing the deportation laws through the INS. The district director normally makes the decision to institute deportation proceedings. An immigration judge, trained in law, then conducts proceedings to determine deportability. This is the sole and exclusive procedure for determining the deportability of an alien under the sections of law involved. 8 U.S.C. 1252(b). "The immigration judge is empowered to make all decisions necessary to dispose fully of the case and may order that the alien be deported, that the

proceedings be terminated favorably to the alien, or that discretionary relief should be afforded." Johns v. Department of Justice of the United States, 653 F.2d 884, 889 (5th Cir. 1981). The hearing before an immigration judge affords the alien the right to counsel, the opportunity to present evidence and cross examine witnesses. If the immigration judge finds that deportation is appropriate, the decision may be appeal to the Board of Immigration Appeals, and thereafter to the Court of Appeals. 8 U.S.C. §1105.[7]

In Randall's case the immigration judge denied the adjustment of status

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[7]The immigration judge is not bound by the district director's previous decision, whether it is based on statutory grounds or on discretion. Gordon & Rosenfield, §7.7e, §5.8e.

application on statutory grounds.[8] He

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[8]The district director's decision referred to excludable provisions under 8 U.S.C. 1182(a)(28) but based the denial on his discretion. It is not clear that he decided conclusively that Randall was statutorily eligible. "There are numerous decisions relating to the discretionary authority of the Attorney General in the adjudication of applications for adjustment of status...All of these decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under Section 245 of the Act, the grant of an application is a matter of discretion and administrative grace." Complaint, Exhibit A at 6. Statutory eligibility need not be decided if an adjustment of status is denied for discretionary reasons. Immigration and Naturalization Service v. Bagamasbad, 429 U.S. 24, 97 S. Ct. 200 (1976). The immigration judge extensively reviewed Randall's works and analyzed her statutory eligibility. Section 212(a) of the Immigration and Naturalization Act (8 U.S.C. §1182(a) sets forth thirty-three classes of aliens ineligible to receive visa and excluded from admission to the United States. He concluded that she was excludable under 8 U.S.C. §1182(a)(28)(G)(v). This section relates to an alien whose writing advocate the economic, international, and governmental doctrines of world communism. Any review of this conclusion on constitutional or insubstantial evidence grounds is clearly not before this court.

further analyzed the discretionary considerations and outlined what factors should be balanced.[9] As mentioned previously in this memorandum, he found that the favorable exercise of discretion would be warranted if Randall were eligible to receive an immigrant visa. Significantly, the opinion states that the favorable or unfavorable exercise of discretion cannot and must not be based upon the personal political opinion of the adjudicating officer. Clearly, the review process set in motion has given Randall the fair consideration she warrants. If Randall's or plaintiffs' First Amendment freedoms were affected by the district director's discretionary determination the

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[9]The district director's decision does not mention any balancing of factors, positive or negative, in deciding Randall's case. The sole focus is on her writing

immigration judge has found in Randall's favor on the discretion issue.

IV.

Congress has conferred broad discretion to INS officials in most immigration matters. Judge Friendly cautions, however, that an abuse of discretion will be found if a decision is made without a rational explanation, inexplicably departing from established policies, or resting on an impermissible basis such as invidious discrimination against a particular race or group or on other "considerations" that Congress could not have intended to make relevant. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715, 719 (2d. Cir. 1966). The Supreme Court has upheld the constitutionality of exclusions under 8 U.S.C. §1182(a)(28) which indisputably rest

on an individual's political beliefs. Kleindienst v. Mandel, 408 U.S. 753, 92 S. Ct. 2576 (1972). This is not to say that First Amendment freedoms are denied to aliens residing in this country. Bridges v. Wixon, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449 (1945). Although the Court need not decide the matter directly, it is unlikely that Congress intended that discretionary relief could rest solely on an individual's non-proscribed political opinions. However wide the District Director's discretion is, it must be tempered by fixed guidelines and constitutional considerations. Insofar as Randall's case received favorable reconsideration on the discretionary issue by the immigration judge, there is no longer a need to remand the case to the district director. Nasan v. Immigration

and Naturalization Service, 449 F. Supp. 244, 246 (N.D. Ill. 1978); Najafi v. Civiletti, 511 F. Supp. 236, 240 (W.D. Mo. 1981).

On the unique facts in this case and after careful consideration of the motions, opposition thereto and the counsels' oral argument, the Court concludes that this case should be dismissed. An appropriate order has been issued.

_____	Signed _____
Dated	JUDGE JOHN GARRETT PENN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET J. RANDALL, et al.,

Plaintiffs,

v.

C.A. No. 85-3415

EDWIN MEESE, III, et al.,

Defendants.

ORDER

This matter is before the Court on defendants' motion to dismiss. An order denying plaintiffs' motion for preliminary injunction was issued May 13, 1987. After a thorough consideration of defendants' motion, the opposition thereto and the record herein, this Court concludes that the motion to dismiss should be granted. The Court's reasoning is set forth in the attached opinion. Therefore, it is hereby

ORDERED that defendants' motion to dismiss is granted, and it is further,

ORDERED that this case is dismissed.

Dated: _____ Signed _____
JUDGE JOHN GARRETT PENN

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 87-5230 SEPTEMBER TERM, 1987

D.C. Civ. No. 85-03415

Margaret J. Randall, et al.,

Appellants

v.

Edwin Meese, III, Attorney General, et al

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIVKA, RUTH B. GINSBURG and SILBERMAN, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court,

that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

Date: August 16, 1988

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 87-5230 SEPTEMBER TERM, 1988

C.A. No. 85-03415
Filed Oct. 24, 1988

Margaret J. Randall, et al.,

Appellants

v.

Edwin Meese, III, Attorney General, et al

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIVKA*, RUTH B. GINSBURG and SILBERMAN, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed September 26, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

* Judge Mikva would grant rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 87-5230 SEPTEMBER TERM, 1988

C.A. No. 85-03415
Filed Oct. 24, 1988

Margaret J. Randall, et al.,

Appellants

v.

Edwin Meese, III, Attorney General, et al

BEFORE: Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the full court. No member of the Court requested the taking a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPREE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1412

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET J. RANDALL, ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in view of petitioner's pending deportation proceedings, the court of appeals correctly ruled that her challenge to the denial of her application for adjustment of status should await the outcome of those proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1412

MARGARET J. RANDALL, ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 854 F.2d 472. The opinion of the district court (Pet. App. 94a-123a) is unreported. The opinion of the district director (Pet. App. 53a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1988. A petition for rehearing was denied on October 24, 1988 (Pet. App. 128a-129a). Pursuant to an order issued by Chief Justice Rehnquist, the time within which to file a petition for a writ of certiorari was extended to and including February 21, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 245(a) of the Immigration and Nationality Act provides that "[t]he status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence." 8 U.S.C. 1255(a). Under regulations of the Attorney General, an alien may apply for an adjustment of status under Section 245 in two settings. First, if the alien is not in deportation proceedings, he may file an application for adjustment of status with a district director of the Immigration and Naturalization Service (INS). 8 C.F.R. 245.2(a)(1).[1] "No appeal lies from the denial of an application by the district director." 8 C.F.R. 245.2(a)(5)(ii).

Second, if the alien is placed in deportation proceedings following the district director's denial, "the applicant retains the right to renew his or her application in [deportation] proceedings under Part 242 of this chapter." 8 C.F.R. 245.2(a)(5)(ii). In such proceedings, the status adjustment application receives *de novo* consideration. *Matter of Palmieri*, 10 I&N Dec. 187, 189 (B.I.A. 1963). Denial of adjustment of status by an Immigration Judge (IJ) can be appealed to the Board of Immigration Appeals (BIA). 8 C.F.R. 3.1(b)(2), 3.36(a), 242.21. The BIA's decision is subject to exclusive review in a court of appeals. 8 U.S.C. 1105a; *Foti* v. *INS*, 375 U.S. 217, 226 (1963).

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[1] However, if the alien has been served with an order to show cause why he should not be deported or with a warrant for arrest, his application for adjustment of status "shall be made and considered only in [deportation] proceedings." 8 C.F.R. 245.2(a)(1); see also 8 C.F.R 242.17(a).

2. Petitioner Margaret J. Randall, a writer and photographer, was born in the United States in 1936.[2] Pet. App. 2a. After leaving the United States in 1961, petitioner lost her United States citizenship on July 13, 1967, when she declared her allegiance to Mexico. *Ibid.* She resided in Mexico, Cuba, and Nicaragua until 1984. *Id.* at 14a. In January 1984, petitioner entered the United States on a visitor's visa and took up residence in Albuquerque, New Mexico, near her parents' home. *Id.* at 15a, 54a, 96a. Soon thereafter, she married an American citizen, *id.* at 96a, and obtained employment as a professor at the University of New Mexico. *Id.* at 15a, 96a.

On March 14, 1984, petitioner filed an application with the district director of the INS in El Paso, Texas, seeking an adjustment of status to that of permanent resident. Pet. App. 54a. Her application rested on an immediate relative visa petition (see 8 U.S.C. 1154(a)) filed the same day by her United States citizen husband. *Ibid.*

On October 2, 1985, the district director denied petitioner's application for adjustment of status. Pet. App. 53a-74a. The district director observed that "[b]enefits under section 245 of the Act * * * are discretionary," and, citing several decisions of the BIA, stated that "[a]ll of these [BIA] decisions, with others, point out that even though the applicant appears to be statutorily eligible for the benefits under Section 245 of the Act, the grant of an application is a matter of discretion and administrative grace." *Id.* at 72a. The district director then concluded that petitioner was not entitled to the exercise of discretion in her favor because "[s]he has failed to show that she is

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[2] We refer to Margaret J. Randall as "petitioner" because this case involves the denial of her application for an adjustment of status. The other petitioners in this Court include "[s]everal prominent authors, a world association of writers, two academic colleagues, and a student enrolled in Margaret Randall's courses" (Pet. App. 26a).

clearly and beyond a reasonable doubt entitled to the benefits for which she has applied." *Id.* at 73a. In particular, the district director stated that "[h]er writings go far beyond mere dissent, disagreement with, or criticism of the United States or its policies." *Ibid.* Rather, "[h]er associations with, and her activities and writings in support of the communist dominated government of Cuba, North Vietnam, and Nicaragua; and her advocacy and support of revolutionary activity in Mexico as well as her affiliation with and participation in Communist Party activities, warrant the denial of her application for adjustment of status as a matter of discretion." *Id.* at 73a-74a. The district director allowed petitioner until October 30, 1985, to depart voluntarily from the United States. *Id.* at 21a-22a.

3. On October 28, 1985, petitioner filed an action in the United States District Court for the District of Columbia seeking review of the district director's denial of her application. Pet. App. 25a-26a. She alleged that the district director had denied her application for adjustment of status on the basis of her ideas and opinions, thereby exceeding his statutory authority and violating her First and Fifth Amendment rights. She sought a declaratory judgment that 8 U.S.C. 1182(a)(28)(G) and (C) are unconstitutional, and an injunction instructing the district director to grant her application or to reconsider it in accordance with proper statutory and constitutional standards. Pet. App. 26a-27a, 96a-97a.

On November 7, 1985, the INS issued petitioner an order to show cause why she should not be deported. Pet. App. 97a. In light of that development, the district court deferred consideration of petitioner's request for relief and the INS's motion to dismiss. *Id.* at 27a. On August 28, 1986, the IJ denied petitioner's renewed application for

adjustment of status, finding her excludable under 8 U.S.C. 1182(a)(28)(G)(v).[3] The IJ noted, however, that if petitioner were not excludable, her application would merit the favorable exercise of discretion. Pet. App. 98a-99a. Petitioner appealed that decision to the BIA, which heard oral argument on October 20, 1987. *Id.* at 25a. As of this filing, the appeal is pending before the BIA.

On June 5, 1987, the district court dismissed petitioner's action. Although the court did not precisely characterize its holding, it emphasized that its decision rested on the "procedural posture" of the case and the "unique facts" presented. Pet. App. 109a, 123a. The court initially construed petitioner's complaint to be seeking "a fair, just and unbiased determination on her request for adjustment of status." *Id.* at 114a. With that in mind, the court concluded that "[b]ased on the present record thus far, [petitioner] has received the review she seeks." *Ibid.* "Significantly," the court noted, "the [IJ's] opinion states that the favorable or unfavorable exercise of discretion cannot and must not be based upon the personal political opinion of the adjudicating officer." *Id.* at 120a. The court therefore concluded that "[i]nsofar as [petitioner's] case received favorable reconsideration on the discretionary issue by the immigration judge, there is no longer a need to remand the case to the district director." *Id.* at 122a.

4. The court of appeals affirmed, with one judge dissenting. Pet. App. 1a-93a. The court held that peti-

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[3] That subsection provides for the exclusion of aliens "who are, or at any time have been, members of any of the following classes: (G) Aliens who write or publish, or cause to be written or published, * * * any written or printed matter, advocating or teaching * * * (v) the economic, international and governmental doctrines of world communism * * *." 8 U.S.C. 1182(a)(28)(G)(v).

tioner's "resort to court is premature," but made clear that its disposition is "without prejudice to eventual renewal of [petitioner's] claims, in a proper circuit, including her contention that her status should be adjusted as of October 2, 1985, the date the district director denied her application." *Id.* at 3a.

The court noted that petitioner's action in district court "depends entirely on an ingenious, but incorrect characterization of the district director's action." Pet. App. 33a. The court explained that petitioner's request for relief rests on the notion that the district director had first found her to be statutorily eligible for adjustment of status, and had then gone on to deny her application in his discretion, based on the contents of her writings. *Id.* at 33a-34a. If petitioner's view of the district director's opinion were correct, the court observed, and if the district director's decision were "amenable to direct judicial review" (a point that the court did not resolve), then petitioner's "plea for a remand with instructions to grant her status adjustment application would be legitimate." *Id.* at 35a-36a.

But, after a careful reading of the district director's opinion, the court rejected petitioner's assertion that the district director had found her to be statutorily eligible. Pet. App. 36a-40a. Citing *INS* v. *Bagamasbad,* 429 U.S. 24 (1976), the court noted that immigration officials do not have to determine whether an applicant is eligible for adjustment if they intend to deny relief in any event as a matter of discretion. Pet. App. 36a-37a. The court concluded that it was "imaginative, but implausible, to contend that the district director here took any route other than the easy one declared open to him by the Supreme Court, *i.e.,* he pretermitted the subsections 1182(a)(2)(G) and (C) questions, skipping from them to the matter of his discretion." *Ibid.*

Because the district director had not found petitioner to be statutorily eligible, the court reasoned, a remand to the district director at this point would produce several problems. Pet. App. 42a-44a. Such a remand would be "out of sync" (*id.* at 42a) with the regulatory requirement that once an alien is in deportation proceedings, an adjustment of status application "shall be considered only in [such] proceedings." *Id.* at 43a (quoting 8 C.F.R. 245.2(a)(1)). Moreover, a "further complication" was that the IJ decision "now extant" had resolved against petitioner the precise issue that the district director would have to consider: whether petitioner is statutorily eligible for adjustment of status. Pet. App. 43a. Finally, the court added that Congress had recently enacted a law that limited reliance on constitutionally protected "beliefs, statements, or associations" as a grounds for the exclusion of aliens.[4] *Id.* at 43a-45a. This situation has a "confusion-breeding, conflict-generating potential, and renders a return to the district director hardly auspicious for [petitioner.]" *Id.* at 45a.

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[4] The court noted (Pet. App. 43a-44a) that the Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1399-1400, barred, with exceptions not relevant here, the denial of an application for permanent residence "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizens in the United States, would be protected under the Constitution." The court also observed that, while Section 901 was applicable to deportation proceedings pending in 1988, it was not applicable to adjustment applications submitted in 1984. Pet. App. 43a-45a. We note that since the court of appeals' decision, on October 1, 1988, Congress amended Section 901 to limit its application, *inter alia*, to non-immigrant aliens—those who are not seeking permanent residence status. Foreign Operations Appropriation Act, Pub. L. No. 100-461, § 555, 102 Stat. 2268-36 to 2268-37. Accordingly, the current version of Section 901 is not applicable to petitioner.

These factors convinced the court that "[j]udicial review of the questions whether and as of what date [petitioner's] status should be adjusted is not yet in order." Pet. App. 45a-46a. The court viewed petitioner's claim as more susceptible to judicial review "when the deportation proceedings have concluded." *Ibid.* At that time—if the BIA ultimately rules against her—petitioner could advance her claim for adjustment of status in the appropriate court of appeals on review on her deportation order under 8 U.S.C. 1105a. Petitioner would not be prejudiced by taking " 'the normal appeal route,' " because in such proceedings she could "assert the invalidity of the deportation proceedings" and could request the retroactive adjustment of status that she now seeks. *Id.* at 48a-50a.

Judge Mikva dissented. Pet. App. 75a-93a. Based on his own analysis of the district director's opinion (*id.* at 78a-84a), he disagreed with the majority's conclusion that the district director had not found petitioner to be statutorily eligible. Judge Mikva therefore would have held that the district director had unconstitutionally exercised his discretion to deny petitioner's application "because of his dislike for her writings and associations" (*id.* at 76a), and that "but for this unconstitutional determination, [the district director] would have granted [petitioner's] status adjustment." *Id.* at 78a. Judge Mikva was also "skeptical" that petitioner could receive full relief on review of a deportation order, because he believed that a reviewing court would be unlikely to adjust her status retroactively, and, in any event, petitioner's eligibility for citizenship might be delayed by postponing judicial review. *Id.* at 84a-91a.

ARGUMENT

Petitioner challenges the court of appeals' holding that, on the particular facts of this case, judicial review of her

statutory and constitutional claims should await completion of the pending BIA proceedings. Contrary to petitioner's contention, the court of appeals' decision does not turn on novel jurisdictional theories under 8 U.S.C. 1105a, but on the prudential factors involved in a determination of the appropriate timing of judicial review. That prudential decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioner's contentions may be raised in later proceedings, if she is unsuccessful in obtaining administrative relief from the BIA. Accordingly, this Court's review is not warranted.

1. Petitioner's principal contention (Pet. 24-34) is that the court of appeals accepted an erroneous jurisdictional theory that a district director's denial of an adjustment of status can be reviewed under 8 U.S.C. 1105a.[5] In petitioner's view, the court of appeals "has declined to review her challenge to the District Director's denial on the premise that another court of appeals can review it under [Section 1105a]." Pet. 26. Petitioner's understanding of the court of appeals' opinion is incorrect. The court did not hold that 8 U.S.C. 1105a will provide jurisdiction for a court of appeals to review the decision of the district director in this case. Instead, the court held that petitioner's statutory and constitutional claims are not suitable for judicial review now because of a variety of prudential considerations (Pet. App. 42a-50a), and, without construing Section 1105a, the court also determined that the relief

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[5] Section 1105a vests exclusive jurisdiction in the courts of appeals to review "all final orders of deportation * * * made against aliens * * * pursuant to administrative proceedings under section 1252(b) of this title." The cited section refers to proceedings to determine whether an alien is deportable. 8 U.S.C. 1252(b).

petitioner seeks could be requested in later proceedings. Pet. App. 47a-50a.[6]

The court of appeals noted several compelling factors that counsel against immediate review of petitioner's claims. The court observed (Pet. App. 45a-46a) that after an alien has been placed in deportation proceedings, his application for adjustment of status "shall be made and considered only in [those] proceedings." 8 C.F.R. 245.2(a)(1); see also 8 C.F.R. at 242.17(a). A remand of petitioner's case to the district director would be contrary to this regulation.

The court also noted that a remand at this point would be complicated by the fact that the IJ has denied petitioner's application for adjustment of status by finding her ineligible for such adjustment. Pet. App. 43a, 98a-99a.[7] Since, as the court correctly held (see p. 6, *supra*), the district director never ruled on petitioner's eligibility, he would have to consider that question on remand. Should the district director agree with the IJ, petitioner would not benefit from the remand. And assuming that he is free to disagree (an assumption that, the court of appeals noted, Pet. App. 51a n.16, is far from clear), an awkward colli-

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[6] The court of appeals thus considered both of the factors that have been identified by this Court as relevant to the proper timing of judicial review. Pet. App. 46a-47a. In its consideration, a court is required "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage." *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

[7] Unlike the district director, the IJ stressed that petitioner's ideas and beliefs should play no role in the discretionary aspect of his decision—the exact problem that petitioner's district court action was brought to remedy. Pet. App. 119a-120a. But the IJ also found that petitioner is not statutorily eligible for adjustment under 8 U.S.C 1182(a)(28)(G)(v). Pet. App. 119a.

sion would be created between his authority and that of the IJ—precisely the sort of collision that INS regulations are designed to avoid. *Ibid.*[8]

Turning to the hardship to petitioner of deferring judicial review, the court of appeals expressed its view that in a later judicial review proceeding under Section 1105a, petitioner could seek to have her status adjusted retroactively by advancing equitable and constitutional arguments. In particular, the court observed that petitioner could seek retroactive relief by contending that "(i) properly construed, subsection 1182(a)(28)(G)(v) never rendered her ineligible for a visa, or (ii) if [that section] did exclude her, as the immigration judge held it did, then the measure, as applied to her, must be regarded as null from the start because incompatible with the Constitution." Pet. App. 47a-48a. The court did not address the merits of such a retroactivity argument. *Ibid.* The court noted only that petitioner herself had contended, relying on *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), that a court of equity would have power to award such retroactive relief "where necessary to 'do complete rather than truncated justice.' " Pet. App. 50a.[9] Petitioner seeks to re-

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[8] The court also noted that judicial appraisal of petitioner's case "is 'likely to stand on a much surer footing' when the deportation proceedings have concluded" (Pet. App. 46a, quoting *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 161 (1967)), and that those proceedings "may sharpen the controversy or remove the need for decision of at least some aspects of the matter" (Pet. App. 46a-47a, quoting L. Tribe, *American Constitutional Law* 78 (2d ed. 1988)). Finally, the court referred to the change in the law after the district director's action with respect to standards for considering an applicant's ideas or beliefs (Pet. App. 43a-45a), but, as indicated at note 4, *supra*, the current version of that law is not applicable to petitioner.

[9] The question whether such retroactive relief could be awarded to petitioner has not been passed on by any court and is not before this

characterize this holding as one about the future *jurisdiction* of a court of appeals under Section 1105a, but that view finds no support in the language used by the court of appeals to express its holding.

At bottom, petitioner's attack on the court of appeals' approach to the timeliness of her efforts to obtain judicial review is essentially an insistence that the court was wrong about the degree of hardship she faces by deferring that review. In petitioner's view, the court of appeals accorded too much weight to the availability of relief in another forum and at another time. Even if petitioner were correct, that disagreement would not warrant this Court's review. There is no dispute that a court of appeals reviewing a deportation order against petitioner can consider a constitutional claim that the BIA improperly denied her adjustment of status. At most, the decision of the court of appeals here could affect the dates on which petitioner

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Court. We note, however, that the BIA has held that the Attorney General does not have power to approve a status adjustment application *nunc pro tunc. Matter of Palmieri,* 10 I&N Dec. 187, 188-189 (B.I.A. 1963); see also *Matter of Talanoa,* 13 I&N Dec. 161, 163-165 (B.I.A. 1969) (same), aff'd on other grounds, 427 F.2d 1143 (9th Cir. 1970) (per curiam); *Dong Sik Kwon* v. *INS,* 646 F.2d 909, 917 (5th Cir. 1981) (en banc) ("Although discretion is given to the Attorney General to admit applicants, he has no authority to act retroactively on an [adjustment of status] application."). The statute does not provide for the retroactive adjustment of status. Section 1255(b) states that, "Upon the approval of an application for adjustment * * * the Attorney General shall record the alien's lawful admission for permanent residence *as of the date the order of the Attorney General approving the application for the adjustment of status is made.*" 8 U.S.C. 1255(b) (emphasis added). Compare 8 U.S.C. 1153(h) (1976) (providing for the retroactive readjustment of refugee status to that of alien lawfully admitted for permanent residence), repealed, Refugee Act of 1980, Pub. L. No. 96-212, § 203(c)(8), 94 Stat. 107.

would be granted such adjustment and thereafter become eligible for naturalization.[10] See 8 U.S.C. 1427, 1430. While the timing of that decision could affect petitioner, she cites no decision of this Court requiring a court to bow to any possible hardship to a litigant rather than determining that judicial review must be deferred. Cf. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (requiring federal court abstention in view of pending state administrative proceedings).

Taking account of the ongoing deportation proceedings and the immigration judge's ruling, the court of appeals simply determined that petitioner's request for review has been overtaken by the administrative process and that she must await its outcome. The court of appeals' holding that petitioner must pursue that course, rather than obtaining an immediate decision on her claims, "assure[s] that eventual court review will be enlightened by a full record, including the [BIA's] decision, and that this court avoids premature blockage of, or interference with, regulatory actions Congress has assigned to other government bodies." Pet. App. 48a-49a.

2. Because of the narrow, prudential basis of the court of appeals' decision, this case does not conflict with the holdings of this Court construing the scope of 8 U.S.C. 1105a. Petitioner contends (Pet. 29-30) that the court of appeals' holding conflicts with *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), but that argument misconceives the

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[10] In our view, however, the provisions of the Immigration and Nationality Act governing the adjustment of status (see note 9, *supra*) would not permit a court—even one reviewing the district director's decision, as petitioner seeks—to adjust an alien's status retroactively to the date of application. Cf. *INS* v. *Pangilinan*, 108 S. Ct. 2210 (1988) (rejecting the use of a court's equitable authority to extend a statutory cut-off date to apply for naturalization).

issues presented in each case. *Cheng Fan Kwok* holds that the denial of a stay of deportation by a district director is not reviewable in a court of appeals under Section 1105a because it "neither is a final order of deportation, nor is it * * * 'made during the same proceedings' in which a final order of deportation has been issued." 392 U.S. at 212-213 & n.11.[11] If the court of appeals had held that the rulings of INS district directors could generally be reviewed under Section 1105a, petitioner's claim of a conflict with *Cheng Fan Kwok* might have merit. But the court of appeals did not espouse any such rule. Rather, the court held only that petitioner's constitutional and equitable arguments might entitle her to retroactive relief when a court reviews her claim under Section 1105a. Nothing in *Cheng Fan Kwok* would rule out such relief.

Moreover, even in jurisdictional terms, *Cheng Fan Kwok* is not as absolute a bar to petitioner's presentation of her claim for relief under Section 1105a as she portrays it to be. The Court in *Cheng Fan Kwok* expressly reserved the possibility that some decisions of a district director might be subject to review under Section 1105a on a theory of pendent jurisdiction. 392 U.S. at 216 n.16

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[11] The Court added that, "In situations to which the provisions of [Section 1105a] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." 392 U.S. at 210. That suggestion is not inconsistent with the holding here. The court of appeals held only that review is not timely because of factors not considered in *Cheng Fan Kwok* – the difficulties produced if a district court were to hear a challenge to a district director's denial of an application when the same application has been renewed before, and rejected by, an immigration judge. The court of appeals noted the distinction between this case and *Cheng Fan Kwok* (Pet. App. 50a n.16). (We note that the word "state" in line 5 of the second paragraph of that footnote, as printed in Petitioner's Appendix, should read "stay").

("We intimate no views on the possibility that a court of appeals might have 'pendent jurisdiction' over denials of discretionary relief, where it already has before it a petition for review from a proceeding conducted under § 242(b)."). [12] While we do not concede that pendent jurisdiction would be available for petitioner, she has not yet explored such an approach before a court of appeals. We note only that *Cheng Fan Kwok* does not foreclose her from framing an argument for relief under Section 1105a. [13]

3. Petitioner next contends (Pet. 26, 28-33) that the decision in this case conflicts with holdings of other courts of appeals. Petitioner's claim of a conflict depends entirely on her view that the court of appeals resolved a jurisdictional issue about the scope of Section 1105a. The cases cited by petitioner do deal with that issue, but that was not

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[12] The courts of appeals have responded to this suggestion by developing pendent jurisdiction principles in this area. See, *e.g.*, *Ghorbani* v. *INS*, 686 F.2d 784, 789-790 (9th Cir. 1982) (pendent jurisdiction under Section 1105a requires that there have been a factual hearing or that one is unnecessary because the question is purely legal); *Tooloee* v. *INS*, 722 F.2d 1434, 1437 (9th Cir. 1983) (same); *Mohammadi-Motlagh* v. *INS*, 727 F.2d 1450 (9th Cir. 1984) (same). The Tenth Circuit, one of the courts of appeals where petitioner could challenge a deportation order against her, has applied a pendent jurisdiction analysis. *Olaniyan* v. *District Director, INS*, 796 F.2d 373, 376 (1986) (rejecting pendent jurisdiction on the facts presented).

[13] See also *Chadha* v. *INS*, 462 U.S. 919 (1983), in which the Court held that a court of appeals had jurisdiction under Section 1105a over a constitutional challenge to a one-house veto of the Attorney General's suspension of deportation. The Court reasoned that "the term 'final orders' in [Section 1105a] 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.' " 462 U.S. at 938 (quoting *Chadha* v. *INS*, 634 F.2d 408, 412 (9th Cir. 1982)).

the basis of the court of appeals' decision in this case. None of the cases cited by petitioner considered the question of the timeliness of judicial review that was addressed by the court of appeals.

The overwhelming majority of the cases petitioner cites involve courts of appeals' refusal to hear, under Section 1105a, complaints about district directors' denials of forms of relief other than adjustments from temporary to permanent status.[14] Those cases do not involve requests for retroactive relief along the lines petitioner would seek if her constitutional claims were ultimately sustained. Other cases cited by petitioner hold (or suggest) that the determinations of district directors may be challenged in district court in the first instance, but none involves a challenge to a district director's denial of relief in the midst of ongoing deportation proceedings, where the court's immediate exercise of jurisdiction could impermissibly in-

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[14] See *Sadegh Nobari* v. *INS*, 676 F.2d 1348 (10th Cir. 1982) (court of appeals refused to consider, on petition for review under 8 U.S.C. 1105a, the district director's refusal to grant a change from one temporary status to another—a matter that was not or could not be renewed before the IJ); *Ibrahim* v. *U.S. INS*, 821 F.2d 1547 (11th Cir. 1987) (same with respect to district director's denial of waiver of foreign residency requirement in applying for immigrant visa); *Conti* v. *INS*, 780 F.2d 698 (7th Cir. 1985) (same with respect to district director's oral denial of an immediate relative visa petition); *Fatehi* v. *INS*, 729 F.2d 1086 (6th Cir. 1984) (same with respect to district director's denial of permission to transfer schools); *Torabpour* v. *INS*, 694 F.2d 1119 (8th Cir. 1982) (same with respect to district director's decision not to grant an extension on a student visa); *Fleurinor* v. *INS*, 585 F.2d 129 (5th Cir. 1978) (same with respect to district director's denial of asylum when, under the then-current statute and regulations, the application could not be renewed before the IJ); *Wall* v. *INS*, 722 F.2d 1442, 1443-1444 (9th Cir. 1984) (same with respect to district director's discretionary denial of "deferred action status").

terfere with the administrative process—as it could here.[15] Cf. *Small* v. *Kiley*, 567 F.2d 163 (2d Cir. 1977) (reversing preliminary injunction against deportation proceedings); *Nasan* v. *INS*, 449 F. Supp. 244, 246 (N.D. Ill. 1978) (entertaining challenge to district director action, but implying that court's intervention would be unnecessary if alien were in deportation proceedings from which he would have a "clear method of review" in the court of appeals).

Finally, a handful of courts of appeals' decisions cited by petitioner hold that a district director's denial of adjustment of status is not reviewable in the court of appeals together with a deportation order under 8 U.S.C. 1105a.[16] Nothing in those opinions, however, indicates that the

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[15] See, *e.g.*, *Salehpour* v. *INS*, 761 F.2d 1442 (9th Cir. 1985) (permitting district court's review of the denial of adjustment of status in a case in which there was no pending deportation proceeding and no possibility of producing a conflict with the ruling of the IJ); *Jaa* v. *United States INS*, 779 F.2d 569 (9th Cir. 1986) (permitting district court review of district director's denial of adjustment of status in a case in which deportation proceeding had concluded and the applicant apparently had not renewed her adjustment application in those proceedings); *Olaniyan* v. *District Director, INS*, 796 F.2d 373, 376 (10th Cir. 1986) (court of appeals, on review of a deportation order, suggested that district director's denial of work authorization could be reviewed in district court); *Shoja* v. *INS*, 679 F.2d 447, 450-451 (5th Cir. 1982) (same with respect to district director's denial of a request to transfer from one university to another).

[16] In *Che-Li Shen* v. *INS*, 749 F.2d 1469, 1472 (10th Cir. 1984) (cited at Pet. 26, 31), the court stated that it had jurisdiction to review only the denial of an adjustment of status application by the IJ, and "[i]t follows, then, that the District Director's * * * denial of Shen's original adjustment application is not reviewable in this Court." *Id.* at 1472. But because the court concluded (*id.* at 1473) that Shen was not qualified for an immigrant visa—a requirement for adjusting one's status—it never had to address the question of the effective date of

aliens had requested the court to exercise pendent jurisdiction or to grant retroactive relief based on the sort of equitable grounds to which the court of appeals alluded here. In short, none of the court of appeals' decisions cited by petitioner addressed the prudential concerns that largely informed the court of appeals' decision in this case, nor did any consider the retroactivity claims that petitioner might raise in later proceedings.[17]

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any adjustment if Shen were qualified. *Jaa* v. *United States INS*, 779 F.2d 569 (9th Cir. 1986), affirmed the district court's review of a district director's denial of adjustment of status, apparently on the view that such a ruling fell outside the scope of Section 1105a. That case never discussed issues relating to retroactive relief.

[17] We note that the court of appeals did not reach the argument that the judgment of the district court could be affirmed on the ground that petitioner must exhaust her administrative remedies in the pending deportation proceeding rather than seeking immediate judicial review. See Pet. App. 35a; Gov't C.A. Br. 14-16. That alternative approach to the timeliness of judicial review has merit. Courts have so held in the context of asylum applications, which (like status adjustment applications) can first be made to district directors and then renewed in deportation proceedings. See *Kashani* v. *Nelson*, 793 F.2d 818, 826-827 (7th Cir.) ("[T]he goals of judicial and administrative efficiency are promoted in requiring an alien seeking asylum to exhaust his administrative remedies before seeking judicial relief. [W]e hold that aliens may not seek district court review of the District Director's denial of their asylum petitions and injunction of deportation proceedings but must exhaust their administrative remedies by renewing the asylum petition in the ensuing deportation proceeding."), cert. denied, 479 U.S. 1006 (1986); *Yim Tong Chung* v. *Smith*, 640 F. Supp. 1065, 1069 (S.D.N.Y. 1986) (dismissing action seeking review of denial of asylum by district director after deportation proceedings were pending because this would "afford judicial review twice—once by resort first to the District Court from the discretionary denial of asylum by the District Director, and then again to the Court of Appeals pursuant to § 1105a following an unsuccessful *de novo* presentation to an Immigration Judge and appeal to the BIA."). In *Jaa* v.

4. Finally, petitioner contends (Pet. 35-38) that this Court should grant certiorari on the theory that this case raises the "serious constitutional question" that would exist if "a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe,* 108 S. Ct. 2047, 2053 (1988). The court of appeals, however, did not deny petitioner a forum in which to present her constitutional claims. Rather, the court expressly reserved petitioner's right to raise those claims in a different forum and at a different time. The deferral of such review does not unconstitutionally deny petitioner an opportunity to present her claims. Cf. *Jains* v. *INS,* 612 F.2d 683, 689 (2d Cir. 1979) (rejecting claim that alien was "denied due process because he was unable to appeal the original denial of his section 245 application directly and could only do so in the context of deportation proceedings"), cert. denied, 446 U.S. 937 (1980).

Petitioner is concerned that she may somehow be precluded from obtaining complete relief in the future, but that may never come to pass. The BIA may rule in her favor, or a court of appeals reviewing her deportation order may grant her all the relief she seeks. These possibilities underscore the court of appeals' wisdom in refusing to accelerate review of the constitutional questions that petitioner presents. Those same possibilities make fully applicable here the principle that this Court will not prematurely entertain constitutional disputes that may never require judicial intervention. See *Ashwander* v. *TVA,* 297 U.S. 288, 345-356 (1936) (Brandeis, J., concurring).

United States INS, 779 F.2d 569 (9th Cir. 1986), the court rejected, without analysis, an exhaustion requirement as applied to an alien's challenge to a district director's denial of status adjustment. We believe that *Jaa* is incorrect, but, in any event, that case is distinguishable because the alien there apparently did not renew her status adjustment application before the IJ and had no opportunity for judicial review other than in district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 88-1412

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET J. RANDALL; NORMAN MAILER; ARTHUR MILLER; TONI MORRISON; ANNE NOGGLE; GRACE PALEY; PEN AMERICAN CENTER; ROSE STYRON; WILLIAM STYRON; HELENE VANN; KURT VONNEGUT; ALICE WALKER; DR. MARY MARTHA WEIGLE,

Petitioners,

—against—

RICHARD THORNBURGH, in his capacity as Attorney General of the United States; ALAN C. NELSON, in his capacity as Commissioner of the Immigration and Naturalization Service; A.H. GIUGNI, in his capacity as District Director of the Immigration and Naturalization Service, El Paso, Texas,

Respondents.

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 6, 1989

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No. 88-1412
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

MARGARET RANDALL, et al.,

Petitioners,

v.

RICHARD THORNBURGH, et al.,

Respondents.

PETITIONERS' REPLY IN SUPPORT
OF A WRIT OF CERTIORARI

This reply responds briefly to several contentions advanced in respondents' opposition to the petition for a writ of certiorari.

1. Respondents' opposition rests on two related propositions. First, respondents argue that the jurisdictional conflict pointed to in the petition is illusory because the court of appeals' decision is simply a "prudential" holding

that petitioners' claims are premature. Opp. 9-18. Second, they assert that because the court of appeals did not deny but only deferred review of petitioners' claims, no constitutional problems are raised by the court's refusal to entertain petitioners' substantial constitutional claims. Opp. 19.

Both propositions share the same flaw: the court of appeals' "prudential" holding that the case is premature is premised upon its determination that review is available later under 8 U.S.C. §1105a.[1] And because that jurisdictional construction is erroneous, the court's

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[1] Pet. App. 30a (Randall's "substantive pleas [are] untouched, it is true, but [they are] still open for judicial review at a later time -- when a final order has been made by the Board of Immigration Appeals -- and in another place -- in the judicial circuit in which the El Paso district director and immigration judge proceeded, or the judicial circuit in which Randall resides. See 8 U.S.C. §1105a(a)(2).").

decision both creates a conflict with the holdings of this Court and other courts of appeals, and denies petitioners any review of the district director's patently unconstitutional action.[2]

It is not surprising that respondents make no attempt to defend the court of appeals' jurisdictional interpretation of Section 1105a, for it is contrary to the construction advocated

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[2]The disingenuousness of respondents' argument is demonstrated by their own words. They first claim that the Court's decision was not based "on novel jurisdictional theories under 8 U.S.C. §1105a, but on the prudential factors involved in the appropriate timing of judicial review," Opp. 9, and that "without construing Section 1105a, the Court also determined that the relief petitioner seeks could be requested in later proceedings." Id. at 10. These are non sequiturs, for the only way to determine whether relief "could be requested in later proceedings" is precisely by "construing Section 1105a." Respondents effectively admit this later, when they state that "the court of appeals expressed its view that in a later judicial proceeding under Section 1105a, petitioner could seek to have her status adjusted retroactively." Id. at 11.

by the INS itself in other cases. Pet. 32-33.

2. Respondents suggest in passing that petitioners' claims might be reviewable under Section 1105a under "pendent jurisdiction." Opp. 14-15 and n.12.[3] But the cases respondents cite make clear that petitioners' challenge to the district director's decision would not be appropriate for pendent jurisdiction.[4] In each case, the courts

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[3]The court of appeals never mentioned pendent jurisdiction.

[4]Olaniyan v. District Director, INS, 796 F.2d 373, 376 (10th Cir. 1986); Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984); Tooloee v. INS, 722 F.2d 1434 (9th Cir. 1983); Ghorbani v. INS, 686 F.2d 784 (9th Cir. 1982). Indeed, given the procedural parallel between petitioners' claim and the claim in Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), see Pet. 29-30 and n.9, if pendent jurisdiction were appropriate here, it would have been appropriate in Cheng Fan Kwok. Yet while the Cheng Fan Kwok Court mentioned pendent jurisdiction, it held that the court of appeals lacked jurisdiction to hear Cheng Fan

rejected pendent jurisdiction when faced, as here, with a challenge to a district director's discretionary decision rendered prior to deportation proceedings. See also Wall v. INS, 722 F.2d 1442, 1443-44 (9th Cir. 1984).[5]

3. Respondents further assert that granting review at this point would interfere with ongoing deportation proceedings. This argument is a red herring. First, petitioners filed their

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Kwok's claim.

[5]Pendent jurisdiction is appropriate in only two instances: "when there has been a factual hearing on the issue, equivalent to that required by section 242(b) [8 U.S.C. §1252(b)], or when such a hearing is unnecessary." Ghorbani, 686 F.2d at 790. Here, as in Ghorbani, Tooloee, Mohammadi-Motlagh, Wall, and Olaniyan, no factual hearing was held, and a hearing is necessary to review the record of the district director's decision. In addition, petitioners claimed that the district director's decision was part of a pattern and practice of using the immigration laws to curb dissent, which clearly requires a hearing. Pet. App. 97a.

suit not "in the midst of ongoing deportation proceedings," Opp. 16, but before any deportation proceedings were instituted. Second, the deportation proceedings would not be "ongoing" but for the allegedly unconstitutional decision of the district director to deny Ms. Randall permanent resident status in the first place. To hold that a court should defer to proceedings instituted by the defendant after suit is filed, and that could not have been instituted absent the allegedly unconstitutional action under review, would grant district directors carte blanche to violate the Constitution without review.[6]

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[6]Respondents also point to the fact that, in the deportation proceeding that should never have been instituted had the district director considered her application within constitutional limits, an immigration judge has found Ms. Randall statutorily ineligible for adjustment of status because of the content of her writings.

4. Finally, respondents belittle Ms. Randall's harm, stating that "[a]t most the decision of the court of appeals here could affect the dates on which the peititioner would be granted such adjustment [of status] and thereafter become eligible for naturalization." Opp. 11-12. Even if this were the only effect of the court of appeals' decision, this Court has twice found such a delay in eligibility for naturalization to be cognizable harm. Pet. 22 n.6.

Moreover, this is not the only harm Ms. Randall suffers. Since October 1985, when the District Director denied her application for permanent resident

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Opp. 10-11. Even if the deportation proceedings were not void ab initio, this determination would not be binding on the district director, because administrative determinations on admissibility have no res judicata effect. Matter of Bark, 14 I&N Dec. 237 (BIA 1972); Talavera v. Pederson, 334 F.2d 52, 57 (6th Cir. 1964).

status, Ms. Randall has lived in a sort of limbo, without legal status, solely because a government official disapproved of the political content of her writings. The INS has denied Ms. Randall authorization to work while she remains here. And she is unable to travel abroad even for a day, for to do so would be considered a concession that she is deported. 8 C.F.R. §245.2(a)(3)(1986). As a professor and writer who specializes in oral history of Latin American peoples, this restriction severely hampers her ability to pursue her profession. The restriction also bars her from visiting her children and grandchildren who live abroad.

CONCLUSION

The court of appeals relegated Ms. Randall to a non-existent remedy for a substantial constitutional claim. Its contention that it was only deferring, not denying, Ms. Randall's claim, rests on a jurisdictional construction of 8 U.S.C. §1105a contrary to the holdings of every other court to address the matter. If Ms. Randall deserves a remedy for adverse governmental action resting expressly on the political content of her writings, she can obtain that remedy only in this proceeding. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

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